U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 03 July 2003

CASE NOs.: 2000-LHC-3332
2003-LHC-536

OWCP NOs.: 07-153054
07-164750

IN THE MATTER OF:

ROBERT KEYES, JR.

Claimant

v.

HAM MARINE, INC.

Employer

EAGLE PACIFIC
INSURANCE COMPANY

Carrier

P & T INSULATION COMPANY

Joined Party

RELIANCE NATIONAL INDEMNITY CO.,
IN LIQUIDATION (MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION,
SUCCESSOR-IN-INTEREST)[1]

Joined Carrier

APPEARANCES:

RON M. FEDER, ESQ.

For The Claimant

---

[1] The caption appears as amended at the hearing.

MICHAEL J. MCELHANEY, JR., ESQ.

For The Employer/Carrier

STEPHEN A. (TONY) ANDERSON, ESQ.

For The Joined Party/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This matter involves two claims for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Robert Keyes, Jr. (Claimant) against HAM Marine, Inc. (Employer) and Eagle Pacific Insurance Company (Carrier), P & T Insulation Company (Joined Party or P&T), and Reliance National Insurance Company and Mississippi Insurance Guaranty Association (Joined Carriers). The claims were consolidated and the parties joined by Order of Joinder issued by the undersigned on June 19, 2001.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on January 27, 2003, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Employer/Carrier submitted 33 exhibits which were admitted into evidence. Joined Party/Carriers proffered 20 exhibits which were received along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

The hearing was not closed subject to post-hearing development, including obtaining the deposition testimony and exhibits of Dr. John J. McCloskey and vocational expert Christopher Ty Pennington. On March 25, 2003, the depositions of Dr. McCloskey and Mr. Pennington were received into evidence as CX-34 and PTX-38, respectively.

---

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Employer/Carrier Exhibits: EX-___; Joined Party/Carriers Exhibits: PTX-____; and Joint Exhibit: JX-___.

Post-hearing briefs were received from Employer/Carrier and Joined Party/Carriers on May 7, 2003. On May 12, 2003, Claimant filed a response to the post-hearing briefs. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Act applies to this matter.

2. That there existed an employee-employer relationship between Claimant and Employer at all relevant times.

3. That there existed an employee-employer relationship between Claimant and Joined Party at all relevant times.

4. That Employer was notified of an alleged accident/injury on September 21, 1999.

5. That Employer filed a Notice of Controversion on October 15, 1999.

6. That Joined Party/Carriers were notified of an alleged accident or injury by the June 19, 2001 Order of Joinder issued by the undersigned.

7. That Joined Party/Carriers filed a Notice of Controversion for Case No. 2000-LHC-3332 on March 4, 2002.

8. That Joined Party/Carriers filed a Notice of Controversion for Case No. 2003-LHC-536 on September 10, 2002.

9. That an informal conference before the District Director was held on August 18, 2000, but Joined Party/Carriers did not participate.

10. That an informal conference before the District Director was held on October 2, 2002, in which Joined Party/Carriers participated.

11. That Employer/Carrier and Joined Party/Carriers have not paid any disability or medical benefits to Claimant.

12. Claimant reached maximum medical improvement from his first surgery on September 19, 2000.

13. Claimant reached maximum medical improvement after his last surgery on April 30, 2002.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant’s disability.

3. The reasonableness and necessity of surgical treatment received by Claimant.

4. Entitlement to and authorization for medical care and services.

5. Claimant’s average weekly wage.

6. Claimant’s post-injury wage-earning capacity.

7. Whether Claimant timely notified Employer/Carrier or Joined Party/Carriers about his work-related condition.

8. Whether Employer/Carrier or Joined Party/Carriers are responsible for Claimant’s condition.

9. Whether Employer/Carrier or Joined Party/Carriers are entitled to special fund relief under Section 8(f) of the Act.

10. Whether Employer/Carrier or Joined Party/Carriers are entitled to a credit for any salary paid to Claimant in lieu of disability and medical benefits.

11. Whether Employer/Carrier or Joined Party/Carriers are entitled to a credit for medical benefits paid by third party private carriers.

12. Whether liability by either Employer/Carrier or Joined Party/Carriers for Claimant's condition was terminated by an independent, intervening cause.

13. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

On May 5, 1999, Claimant sustained an injury to his back when he was lifting a large fan which he estimated weighed in excess of one hundred pounds while working as a painter's helper for Employer.[3] He left work immediately and sought medical treatment with Singing River Medical Hospital, where he was prescribed medication. He began treating with Dr. Fineburg, who prescribed additional medication and physical therapy.[4] He was terminated by Employer on May 19, 1999, but continued receiving physical therapy, which concluded in August 1999.[5] (Tr. 63-68).

When he sustained the May 5, 1999 injury, Claimant reported his injury to his supervisor, "Sandman," who was skeptical of his complaints.[6] When he treated at Singing River Medical Hospital,

---

[3] Claimant reported to vocational expert Pennington that he graduated from high school in 1966 and attended junior college "for about a year." He was "just in the introductory stages" of Algebra, English, history and science. He performed basic inventory work in the Army from 1967 to 1970. He underwent an apprentice program in the sheet-metal field in "about 1973." He worked in the paint industry and was a "laborer supervisor" for Brown and Root, for whom he also provided carpentry work. He was a pipe insulator for P&T and a painter-helper for Employer. (PTX-38, pp. 10-11, 13-14).

[4] Claimant was able to perform well at physical therapy because he was taking prescribed pain medication during the physical therapy sessions. (EX-19, pp. 22-23).

[5] Claimant testified his physical therapy did not improve his condition. (EX-20, p. 47).

[6] "Sandman" was a nickname employees used to identify Claimant's supervisor, who preferred the nickname because his name "sounds like a lady's name." (Tr. 105). Claimant's Form

which he visited without any approval by Employer,[7] he was provided a return to light-duty work slip; however, Sandman refused to provide light-duty work to Claimant because no such work was available. Although Claimant returned to his job at full time, he performed it at light duty, for which he was eventually terminated for unacceptable production.[8] (Tr. 105-108).

Claimant began working for P&T after his physical therapy concluded.[9] He experienced increased pain when working with a

---

LS-203 indicates his supervisor's name was "Sean," whose last name was unknown. (EX-2).

[7] Claimant was "quite sure" Employer maintained a policy of reporting job injuries to its medics. He acknowledged Employer maintains a medical office at its facility where he was injured. He was not told to clear the treatment through Employer's medical office before leaving for the hospital. (Tr. 111-112).

[8] Claimant indicated his back pain at Employer "got where I couldn't walk hardly, when I left up out of there I couldn't hardly walk." He stated, "The only thing really helped me was the medication until I had the surgery." (EX-19, p. 21; EX-20, p. 68). After his job injury with Employer, his pain was in his back and the back and calf of his left leg. (EX-20, pp. 39-41). He noted the job required him to lift five-gallon cans of paint. (EX-20, p. 128).

A February 2, 1999 employee evaluation by Employer indicates Claimant's job performance, attendance, attitude and safety habits were "all very good," warranting a merit increase. Claimant was noted for his capability and willingness to work. (EX-6, p. 19). However, Claimant's May 19, 1999 evaluation indicated he was terminated because of a poor level of production, an inability to remain on the job, failure to follow instructions, and unacceptable quality of painting. Id at 20.

[9] Claimant testified in his August 2001 deposition he worked for P&T from August 31, 1999 until March 3, 2000. (EX-20, p. 135).

pipe insulation product, Kaylo, while working for P&T.[10] He informed "Eric," his supervisor, of the pain.[11] (Tr. 63-65).

---

[10] On August 15, 2000, before P&T became involved in this matter, Claimant was deposed. Claimant failed to discuss any job in which he worked with Kaylo for P&T. (EX-19). Rather, Claimant stated he "was just putting up rubber . . . It wasn't nothing but kind of laid back." He did not have to climb, but "could do it pretty comfortable [sic] down there [in the engine room of a vessel], you could almost sit down and do it." He needed only a knife and a tape measure to perform the job, which required him to cut a section from a "little rubber tube" to glue it on a pipe. He was provided two helpers for his job. There was "nothing to it, really." He performed his job under prescribed medications. However, his lower back pain, which was on "both sides," increased to the point he could no longer perform the job. (EX-19, pp. 17-22).

On August 10, 2001, after P&T became involved in this matter, Claimant was again deposed. He was on pain medication at that time, but did not believe his understanding of questions or ability to answer them was impaired. (EX-20, pp. 5-6). He provided new information regarding his job description at P&T. He stated his job with rubber insulation required overhead work, climbing stepladders, occasional bending and stooping. Helpers were available to actually carry boxes of insulation, which Claimant only needed to measure and cut for installation on chilled water lines. (EX-20, pp. 99-101).

Claimant discussed working with Kaylo, which caused him increased pain despite taking his pain medicine at work. (EX-20, pp. 56-63). He did not use the product on the "laid back" or "gravy" Mississippi jobs which involved Navy ships on which he used "all rubber." (EX-20, pp. 95-98, 103-106, 145-147, 150). He used Kaylo mostly on jobs in Louisiana, where he installed Kaylo on hot water or steam lines inside of smokestacks of cargo boats. The product was wrapped around a line and fastened by a metal band. He was required to climb scaffolding using a ladder. He "sometimes" carried a box of Kaylo, but would "take some out of it. I wouldn't carry – Most of the guys carried the whole box." (EX-20, pp. 106-115). He recalled one job in Mississippi which involved Kaylo. He did not lift the Kaylo much, but "the other guys did." Claimant's increased pain returned to its former level after working with Kaylo. (EX-20, pp. 44-45).

[11] At his August 10, 2001 deposition, Claimant testified he did not sustain an accident or injury with P&T. Likewise, he could not identify any specific incident or accident which caused

Claimant underwent surgery with Dr. McCloskey in March 2000. He again received surgical treatment from Dr. McCloskey in December 2000. (Tr. 90, 97). Claimant last underwent surgery with Dr. McCloskey in December 2001. Since then, he neither worked for nor received any wages from any employer. He is unable to perform any household work, walk to the store or sit down for any extended periods of time. If he is driving, he must stop to stretch periodically. For pain in his left leg, he takes pain medication, including Oxycontin twice daily and Lortab five or six times per day. He takes Celebrex for arthritis. When he underwent a January 2003 functional capacity evaluation (FCE), he was on no pain or arthritis medication. (Tr. 44-50).

Although he may drive short distances, Claimant's wife drives longer distances.[12] She drove Claimant to the hearing in this matter. Because of pain, Claimant shifts his weight from his left side to his right side while sitting, which is uncomfortable.[13] (Tr. 50-51).

Claimant continues to receive medical treatment with Dr. Charlton Barnes, who prescribes Lortab.[14] He also treats monthly with a pain specialist who prescribes Oxycontin. Dr. Barnes provided surgery for Claimant's hip and shoulder.[15] (Tr. 51-53,

---

his increased symptoms. He admitted he reported no accident or injuries to P&T nor any of its employees. However, he stated he worked in "vulnerable positions" in a smokestack and slipped "many times." (EX-20, p. 54).

[12] Claimant is unaware of any driving restrictions assigned by any physician. (EX-20, p. 24).

[13] During his August 2001 deposition, Claimant declined an offer to take a break. (EX-20, pp. 93-94). Near the end of the deposition, he admitted he did not leave his chair for four hours and agreed he denied the chance to take a break earlier. It was noted for the record Claimant and Employer/Carrier's attorney "squirmed and shifted" in their chairs "quite a bit." (EX-20, pp. 148-149). It is noted Claimant earlier testified he was on pain medication at the deposition. (EX-20, pp. 5-6).

[14] Claimant testified he requested Employer's authorization to treat with Dr. Barnes, but was told there was no insurance. He never requested authorization from P&T to treat with Dr. Barnes. (EX-20, pp. 19-20).

[15] At the hearing, Claimant sought recovery only for the surgeries performed by Dr. McCloskey. He did not relate his hip

61). He does not drive very far when he takes Oxycontin. He was also prescribed Morphine after his last surgery. (Tr. 61-62).

On cross-examination by Employer/Carrier, Claimant testified he cleaned and prepared areas for painting when he worked as a painter's helper for Employer until his May 19, 1999 termination. After Claimant was injured, Employer placed him on light-duty, but terminated him because he was not capable of doing the work. However, Claimant stated he was performing his former job, which included climbing and bending, at the time he was terminated. (Tr. 53-55).

After his May 1999 job injury, Claimant treated with Drs. Fineburg and McCloskey. He did not recall seeing Dr. Bazzone. After he completed physical therapy, Claimant began light-duty work with P&T. He worked with rubber insulation and Kaylo, a pipe insulation materia, for six months. He was required to bend and climb "a lot." While working for P&T, Claimant worked "a lot of overtime," and his back hurt "worse and worse" while handling Kaylo. (Tr. 55-58).

Claimant denied his termination from P&T was related to "partying" at night. Rather, he was in too much pain to continue working for P&T. He can distinguish between pain on his right or left sides and accurately reported his pain to all of his physicians. (Tr. 59-62).

On cross-examination by Joined Party/Carrier, Claimant admitted he was told by Employer that he was terminated because his level of production was unacceptable. He acknowledged his supervisor in Louisiana was Mr. Ricky Dixon, but affirmed his earlier testimony that he reported his complaints of back pain related to lifting Kaylo with "Eric," his Mississippi supervisor. (Tr. 63-65).

Claimant admitted he took prescription painkillers related to his May 5, 1999 job injury when he was last employed by Employer, during his physical therapy treatment, and when he subsequently became employed by P&T. (Tr. 67-72). Claimant acknowledged his August 10, 2001 deposition testimony indicates he suffered pain in his left leg and hip when he injured his lower back on May 5, 1999; however, he denied at the hearing that he suffered any pain in his left side after the May 5, 1999

---

and shoulder condition to his work-related condition, pending the testimony of Dr. McCloskey, who might relate those conditions to his work-related condition. (Tr. 52-53, 94-96).

injury. Rather, he believed his pain was only on his right side after he sustained his May 5, 1999 job injury.[16] (Tr. 70-72).

Claimant admitted he never requested authorization or permission from Joined Party/Carriers to treat with Drs. McCloskey, Fineburg, or any physician with whom he treated after Dr. McCloskey.[17] He admitted he never reported any history of injury while working for P&T to the physicians of record, except for Dr. Laseter. He admitted he worked in Louisiana voluntarily, and was not required to work there by P&T. (Tr. 72-79, 96).

Claimant lifted boxes of Kaylo which he estimated to weigh around one hundred pounds when he worked with the product on jobs for P&T. He acknowledged his hearing testimony was contrary to his August 10, 2001 deposition testimony indicating he did not lift Kaylo most of the time. Although he admitted regularly taking "a whole lot" of painkillers after August 2001, he denied experiencing memory loss after August 10, 2001. (Tr. 85-89).

Claimant admitted he did not try to find employment anywhere after Dr. McCloskey performed his March 2000 surgery. After the March 2000 surgery, he used his wife's crutches to ambulate, but received no prescription for the crutches. He admitted sustaining an injury when he fell at a friend's house in October or early November 2000. He thought he was on his wife's

---

[16] Claimant testified to the contrary in his August 10, 2001 deposition. There, he specifically stated his pain was on his left side after his job injury for Employer and before his work with P&T. He added the pain continued to become worse after working with Employer. (EX-20, pp. 11-13, 47-48, 78). However, Claimant later stated he did not experience leg or hip pain until after his December 2000 surgery. (EX-20, p. 54). Claimant subsequently testified his left leg and hip were symptomatic after his job injury at Employer, but not as bad as his symptoms after his December 2000 surgery. (EX-20, pp. 70-72). Claimant then "imagined" the symptoms first manifested when he complained of them to Dr. McCloskey on December 13, 1999. (EX-20, p. 143). However, he later explained he was confused by the legal and medical terminology, and testified he suffered the pain in his low back, left leg and left foot after sustaining his injury with Employer. (EX-20, pp. 146-147). At the hearing, Claimant admitted his deposition testimony was correct. (Tr. 71).

[17] Claimant indicated that his wife's private carrier, Blue Cross/Blue Shield, paid for his medical treatment. (Tr. 96). Medical records indicate Blue Cross was his primary pay source. (See e.g, EX-14, p. 134).

crutches at the time. Claimant related his hip problems to his back condition rather than either the slip and fall injury at his friend's house or his previously diagnosed arthritis and gout in his left hip. (Tr. 91-96; EX-20, pp. 77-85).

Claimant admitted his December 2000 surgery with Dr. McCloskey occurred after his slip and fall injury in October or November 2000. He admitted sustaining another injury in a motor vehicle accident in March 2001 before his final surgery with Dr. McCloskey.[18] (Tr. 96-97).

On re-cross examination by Employer/Carrier, Claimant testified he first noticed pain on his left side after working for P&T. He indicated he first worked with Kaylo in Mississippi for P&T before he worked in Louisiana. For the job in Mississippi, he was required to bend, stoop, climb, and lift Kaylo.[19] He could not recall who his supervisor was on the Mississippi job which required the use of Kaylo. He added that he believed he was terminated by P&T partly because Mr. Dixon was upset over a conflict involving Claimant allowing co-employees to use Claimant's truck. He alleged Mr. Dixon was actually drinking on the job. (Tr. 99-100).

Carl Richard Dixon

Mr. Dixon, who is a general foreman for P&T, supervised Claimant on two jobs in Louisiana in January and February 2000. Claimant voluntarily performed the Louisiana jobs to earn extra overtime pay. (Tr. 114-116). Claimant drove his car to the Louisiana jobs and never complained of slipping or exhibited any difficulties climbing ladders. (Tr. 121).

According to Mr. Dixon, P&T's company policy mandates reporting injuries, which must be documented on incident reports by supervisors and signed by the injured employees. Claimant never reported any accident or injury to Mr. Dixon or anyone else working on the jobs. Claimant exhibited no difficulty performing any tasks. (Tr. 116-118).

When Claimant worked with Kaylo, Mr. Dixon observed no complications with Claimant's work. Claimant missed no time, nor

---

[18] Claimant did not believe the car accident increased his symptoms, but acknowledged experiencing new cervical pains. (EX-20, p. 89).

[19] Claimant's August 2001 deposition testimony indicates he did not lift Kaylo much, but "other guys did." (EX-20, p. 145).

took additional breaks. He was primarily responsible for cutting Kaylo, while younger employees were generally responsible for moving the material and installing it. (Tr. 118-121).

On March 2, 2000, Mr. Dixon terminated Claimant because "he was doing sloppy work." Claimant generally performed his job poorly, but gradually became worse. Mr. Dixon opined Claimant was "staying out most of the night," which adversely affected his job performance. Claimant arrived at work "on time, but . . . he didn't have enough sleep." After he received notice of his termination, Claimant gathered his tools, entered his car, and left without saying anything. He reported no complaints of physical inabilities or problems related to his work for P&T, nor did he discuss possible surgery in the future. (Tr. 123-125).

On cross-examination by Employer/Carrier, Mr. Dixon indicated he was unaware of Claimant's work restrictions, but noted Claimant worked the lighter-duty job of cutting material rather than lifting it. Mr. Dixon admitted he never observed Claimant out at night, nor was he aware of any source of information establishing Claimant's proclivities for after-hours entertainment. He was "just going by my feelings" and "drawing conclusions based on whether or not [Claimant] appeared to be tired in the morning." (Tr. 125-130).

Mr. Dixon acknowledged "Ronald Kelly" was Claimant's roommate in Louisiana. Mr. Dixon admitted he never discussed Claimant with Mr. Kelly. He warned the entire crew about staying out at night a day or two after Claimant arrived on the job in February 2000, and individually discussed the situation with Claimant a day or two later. He stated that, when he warned Claimant, " I just told him that I didn't feel like he was holding up his end of the work sometimes." (Tr. 130-134).

According to Mr. Dixon, the jobs in Louisiana required employees to periodically bend to enter a small opening into a smoke stack, where insulation was carried piece by piece up the stack to be installed. Each piece weighed eight to ten pounds, and six or eight pieces may be in a box. No scaffolding was required. Each employee worked eighty-four hours per week. Mr. Dixon admitted employees do not always inform him of their injuries on the job. (Tr. 136-140).

On cross-examination by Joined Party/Carrier, Mr. Dixon acknowledged Claimant appeared to be tired when he was terminated. Mr. Dixon recalled once overhearing Mr. Kelly

announce Claimant did not "come in" until 3:00 a.m. after the crew was warned against staying out late. (Tr.140-144).

On re-cross-examination, by Employer/Carrier, Mr. Dixon noted Claimant was not bent over, but walked slowly and seemed to have no energy as though he had insufficient rest. Mr. Dixon did not believe he could mistake being tired with being in pain and hurting. (Tr. 144).

The Medical Evidence

Singing River Hospital

On May 8, 1999, Dr. Wayne P. Cockrell treated Claimant at the emergency room for complaints of back pain in his right side. Some tenderness was reported, but Claimant had excellent back motion without pain. Dr. Cockrell prescribed ibuprofen and Skelaxin for Claimant's muscular back and flank pain and provided a return to work slip indicating no restrictions were necessary. (PTX-10, pp. 18-20, 26).

On May 17, 1999, Claimant returned to the emergency room for treatment with Dr. Spurgeon Weatherall, M.D., for complaints of right lower back pain which radiated into his right lower abdomen. Some tenderness in the right lower back area was reported. Dr. Weatherall diagnosed muscular back and flank pain, prescribed Flexeril and Cataflam, and removed Claimant from work for two days. Claimant was provided a release to return to work on May 19, 1999 with no restrictions. Id. at 26-27.

On May 24, 1999, Claimant returned for treatment with Dr. Katherine L. Passyn, M.D. at the Singing River emergency room for complaints of low back pain that was "achy in nature" and "insidious in onset." The pain "began two weeks ago after lifting." Relief was reported with Flexeril. Paraspinal tenderness was reported in the left lumbosacral area. Dr. Passyn provided a release to return to work on May 26, 1999 with restrictions against heavy lifting. Id. at 34-35.

On June 3, 1999, Claimant treated with Dr. Douglas McDowell, M.D., at the Singing River emergency room for ongoing complaints of pain after lifting a fan at work a month earlier. Paraspinal tenderness was reported from T6 to L2. Dr. McDowell diagnosed musculoskeletal back pain with a non-focal exam. He prescribed local heat and massage, analgesic balm, Skelaxin, Ultaram and a Medrol-dose pack with a warning against side-effects. Id. at 44-45, 51-52.

On November 6, 2000, Claimant treated with Dr. Weatherall for complaints of hip pain after falling three weeks earlier. Claimant's hip X-ray was unremarkable. Dr. Weatherall diagnosed left hip pain of questionable etiology. (PTX-10, p. 205).

Dr. Steven Bruce Fineburg, M.D.

On September 10, 2002, the parties deposed Dr. Fineburg, who has specialized in family medicine for 25 years. He treated Claimant for back pain after Complainant was seen at Singing River Emergency Room in May 1999. Claimant primarily treated for right-sided pain at the emergency room, but exhibited paraspinal tenderness in the left lumbosacral area on May 24, 1999. (EX-18).

On May 28, 1999, Claimant treated with Dr. Fineburg for complaints of low back pain after a job injury "a couple of weeks" earlier. Dr. Fineburg reported pain over the lumbosacral area without identifying any particular side. (EX-18, pp. 11-12, 75).

Dr. Fineburg prescribed physical therapy. He noted Claimant complained of right-sided pain during his physical therapy, which concluded on August 27, 1999. Dr. Fineburg did not treat Claimant again until November 16, 1999. He deferred to the physical therapist to conclude whether or not the physical therapy was successful. (EX-18, pp. 16-17).

According to Dr. Fineburg, no evidence of neurologic compromise was reported in May or June 1999. Thereafter, a physical therapist reported Claimant was pain-free in August 1999. The physical therapist failed to discuss any evidence of radiating pain or nerve root compression. Consequently, Dr. Fineburg concluded Claimant improved and returned to normal physical activity as of August 1999. If Claimant "sustained some other type of problem after that, I think it's subsequent from that initial injury." Dr. Fineburg opined Claimant, who no longer worked with Employer after May 1999, must have injured himself after working with Employer. He concluded Claimant suffered an aggravation or exacerbation after working with Employer. (EX-18, pp. 20-23, 57-58).

On November 16, 1999, Dr. Fineburg treated Claimant for continuing complaints of low back pain radiating from his low back into his leg area. Although this was the first visit Dr. Fineburg reported pain radiating into Claimant's legs, he noted Claimant's pain continued for three to four months despite undergoing physical therapy. He noted Claimant walked without

difficulty, and reported full range of motion without evidence of neurologic compromise. (EX-18, pp. 17-18, 111).

On cross-examination by Joined Party/Carrier, Dr. Fineburg agreed Claimant reported sustaining an injury to his back when he was lifting a 100-pound fan for Employer. Such an activity could cause a ruptured disc. Dr. Fineburg agreed Claimant received restrictions against heavy lifting on June 3, 1999, when he treated with Singing River Hospital for complaints of mid to lower back pain. (EX-18, pp. 26-28).

Dr. Fineburg admitted he was unaware of Claimant's drug use during his physical examinations of Claimant or during Claimant's physical therapy. He agreed Claimant was scheduled for an appointment with Dr. McCloskey on August 27, 1999, when Claimant concluded his physical therapy. (EX-18, pp. 28-33, 108-109).

Dr. Fineburg admitted Claimant never reported improvement after physical therapy. Dr. Fineburg admitted Claimant failed to report any injury he sustained while working with P&T. Because Claimant continued to complain of ongoing back pain after three to four months, Dr. Fineburg diagnosed chronic back pain and referred Claimant to Dr. McCloskey. (EX-18, pp. 35-36)

Claimant's November 24, 1999 MRI indicated a disc protrusion at L5-S1.[20] Dr. Fineburg admitted Claimant could have suffered from the bulging disc at L5-S1 when he treated Claimant on November 16, 1999, despite finding no evidence of neurologic deficit on physical examination. (EX-18, pp. 39-41, 112).

Dr. Fineburg acknowledged a May 21, 2000 letter provided by his office in which he opined Claimant may have sustained a new injury or exacerbated his original injury by lifting a lawnmower or working with P&T.[21] He admitted ignorance of Claimant's job description at P&T. He could not render an opinion on what caused Claimant's condition at L5-S1. The natural progression of a small defect in the annulus of Claimant's spine could have caused his herniated disc. (EX-18, pp. 44-51, 174-175). He

---

[20] Dr. Fineburg does not normally order an MRI for patients who are asymptomatic. (EX-18, pp. 39-40). After examining Claimant on November 16, 1999, Dr. Fineburg ordered Claimant's November 24, 1999 MRI. (EX-14, p. 95).

[21] Dr. Fineburg treated Claimant on July 1, 1999 when Claimant reported pain in the lumbosacral area after moving a lawnmower. (EX-18, p. 174; EX-17, p. 3).

agreed Claimant was occupationally disabled after his job injury. He noted chronic back pain may be disabling. (EX-18, pp. 53-54).

Dr. Fineburg testified Claimant was taking Anaprox and Flexeril at his initial examination on May 28, 1999. Flexeril "can dull your symptoms and kind of distort things," but Dr. Fineburg opined the medication would not "mask any neurological compromise." (EX-18, pp. 55-56).

Dr. John McCloskey, M.D.

Dr. McCloskey was deposed by the parties on February 14 and 21, 2003. He is a neurosurgeon who has treated Claimant since December 13, 1999, when Claimant complained of low back, left hip and posterolateral left leg pain radiating to his left foot with numbness and tingling. Claimant reported continuing problems since sustaining a back injury several months earlier while working for Employer. Claimant treated with several physicians, underwent an MRI, and was currently working for P&T. He was not taking painkillers. (CX-34, pp. 6-8; CX-34, exhibit no.8, pp. 52-56; EX-14, pp. 127-132).

Physical examination revealed Claimant's pain was on his left side. Claimant's low-back MRI, appeared to indicate to Dr. McCloskey that Claimant suffered a ruptured disc at L5. Dr. McCloskey ordered an MRI which confirmed his opinion. He recommended surgery, which was performed on March 17, 2000. The surgery revealed a bulging disc on the left side underneath the nerve root at L5. Its presence was consistent with Claimant's complaints of pain. (CX-34, pp. 9-10; CX-34, exh. no. 8, pp. 66-67; EX-14, pp. 44-45).

On September 19, 2000, Dr. McCloskey placed Claimant at maximum medical improvement when Claimant's condition improved after the March 2000 surgery. He assigned Claimant a ten percent partial whole-body impairment and restricted Claimant from performing heavy, strenuous or overhead work. (CX-34, pp. 11-12; EX-14, p. 22).

On November 6, 2000, Claimant treated at Singing River Hospital Emergency Room after reportedly falling and injuring his hip three weeks earlier. Since the hip injury, he complained of ongoing pain in his left hip and numbness in his left leg.[22] On

[22] November 2000 CT scans of Claimant's hip and pelvis revealed small osseous fragments which appeared to represent an old fracture. There was no evidence of any new fracture after

December 1, 2000, Claimant obtained an MRI through another physician, Dr. Longnecker. On December 18, 2000, he treated with Dr. McCloskey, who reviewed the MRI and opined Claimant suffered from a recurring herniation at the site of previous surgery at L5. At that time, Claimant walked using crutches. On December 21, 2000, when Dr. McCloskey performed surgery, he found no "straightforward recurrent disc herniation, but found a bulging disc at L5, scar tissue, and arthritis. (CX-34, pp. 14-20; CX-34, exh. no. 8, pp. 79-94; EX-14, pp. 2-5, 8, 14-15, 18-19, 67-68, 72).

Dr. McCloskey received a history of Claimant's Fall 2000 hip injury from the records of Claimant's emergency room visit.[23] He opined the hip injury was more likely than not the cause of Claimant's second surgery. He opined the injury "represents an aggravation, a permanent aggravation of a pre-existing problem." (CX-34, pp. 20-22, 28-32).

According to Dr. McCloskey, Claimant did not recover well after his December 2000 surgery. Dr. McCloskey referred Claimant to Dr. Laseter for pain management. Claimant reported injuries sustained in an automobile accident which "really stirred things up." (CX-34, pp. 22-23). Dr. McCloskey did not know whether the automobile accident constituted a significant aggravation or exacerbation of Claimant's condition. (CX-34, pp. 32-33).

According to Dr. McCloskey, Claimant's history of sustaining a back injury with Employer and working light duty with P&T was "all the history I have." Dr. McCloskey noted that Claimant's physical therapy notes from June 1, 1999 through August 27, 1999 indicated right-sided, work-related back problems which responded to physical therapy. However, he added that merely performing well at physical therapy and being released from physical therapy does not necessarily mean Claimant is "all okay" because physical therapists might conclude patients are doing better than they actually are. (CX-34, pp. 35-38, 55-56, 80-81).

Dr. McCloskey was asked to render an opinion whether or not Claimant injured himself or aggravated his condition while

---

Claimant's fall in October 2000. (EX-14, pp. 7, 10).

[23] A November 15, 2000 handwritten note in Dr. McCloskey's file indicates Claimant treated with "Dr. Ross," who called Dr. McCloskey to determine if ankle injuries would be a new finding after Claimant reported complaints of hip and leg pain after falling "three weeks ago." Claimant was reportedly on crutches. (EX-14, p. 14).

working with P&T, based on the assumption that Claimant's added history of injury while lifting 100-pound boxes of insulation for P&T was true. He opined "something happened" between August 27, 1999 and December 13, 1999, because Claimant was complaining of left leg pain, which was "quite unlike what he was having before August 27, [1999]." He added, "There was another event. You know, a guy with a bad back who's lifting 100-pound things is asking for trouble . . . He had a pre-existing problem with his low back that went over the edge during the period he was working for [Joined Party]." Dr. McCloskey opined something occurred to aggravate Claimant's post-injury condition after leaving Employer despite Claimant's "convoluted" testimony because "there was a significant change . .. after August 27 [1999]." (CX-34, pp. 42-58).

Dr. McCloskey opined Claimant suffered a five-percent permanent partial whole body impairment from the original job injury. He assigned another five-percent impairment for Claimant's condition after Claimant's employment with P&T and subsequent surgery to conclude Claimant should be assigned a total whole-body permanent impairment rating of ten percent. Thus, he apportioned Claimant's disability after the first two surgeries as "50/50."

However, Dr. McCloskey added that Claimant's disability from the first accident and surgery was "50/50," while his disability from the second two surgeries was "50/50" because "maybe they should both bear equal weight, I don't know . . . ." (CX-34, pp. 58-60). He later assigned a fifteen-percent whole-body permanent impairment rating based on Claimant's history of surgeries and ability to function at light duty. (CX-34, p. 63).

Dr. McCloskey would defer to a January 13, 2003 FCE which indicated Claimant was restricted to light-duty work. He would not dispute the findings of the FCE. (CX-34, pp. 60-61).

On questioning by Claimant's counsel, Dr. McCloskey opined Claimant was doing well enough on September 19, 2000, that he could perform medium work, lifting 50 pounds. Claimant should avoid heavy, strenuous or overhead work, including continuous lifting, bench pressing and continuous bending and stooping. He opined Claimant's injury and surgery before September 19, 2000 left him "more vulnerable to injuring his back while performing medium duty." Claimant would likewise be rendered "more vulnerable to injury in a minor automobile accident." Dr. McCloskey concluded Claimant's original surgery "played a role" in the need for additional surgery because "it was the same disc." (CX-34, pp. 61-64).

On questioning by Joined Party/Carrier's counsel, Dr. McCloskey acknowledged receiving Claimant's December 13, 1999 history of continuing problems after suffering a back injury while working for Employer several months earlier. Dr. McCloskey reported no history of Claimant's alleged job injury at P&T. If Claimant reported complaints of his pain on the job, Dr. McCloskey would have discontinued Claimant's work, especially after results seen on Claimant's MRI, myelogram, and CT scan. (CX-34, pp. 65-69). Likewise, if Claimant reported lifting 100-pound boxes, bending, stooping, crawling and climbing, Dr. McCloskey would have reported it and precluded him from returning to that work, which would have been "anything but light duty." (CX-34, pp. 93-95).

Dr. McCloskey admitted Claimant's disc protrusion at L5-S1 before surgery could have caused symptoms on "either the right or the left buttocks or right or left lower extremity." The disc was "bulging underneath the ligament," but had not "ruptured out into the canal." A person suffering a bulging disc may have symptoms, which "frequently . . . come and go." Thus, freedom from symptoms is not an indication that a bulging disc has resolved or healed. (CX-34, pp. 68-70).

Dr. McCloskey received no history of Claimant's drug use other than Soma when he first treated Claimant on December 13, 1999. He denied prescribing medication to Claimant prior to December 13, 1999. According to Dr. McCloskey, Lorcet or Lortab may diminish the severity of symptoms related to bulging discs. If muscle spasms are involved, Flexeril may help. Likewise, a Medrol dose pack, Skelaxin and Ultram may help reduce symptoms from bulging discs. The medications may also improve performance during physical therapy. Dr. McCloskey was not aware Claimant took any of these medications between May 1999 and December 1999; rather, he only knew Claimant was taking Soma at his first examination. (CX-34, pp. 75-78). He was unaware Claimant continued working on medication while employed by P&T. (CX-34, p. 81).

Dr. McCloskey opined physical therapy records would be more objective and detailed with greater accuracy than Claimant's deposition testimony indicating he suffered left-sided back pain, lower left leg pain, lower left ankle pain, and lower left foot pain from the time he was injured with Employer. However, he conceded Claimant's use of medications after May 1999 was not disclosed to him or the physical therapist who administered therapy after Claimant's May 1999 job injury. (CX-34, pp. 78-80).

Dr. McCloskey opined something happened to Claimant's back between the termination of Claimant's physical therapy and his November 16, 1999 visit with Dr. Fineburg, despite Dr. Fineburg finding a full range of motion with no evidence of any neurologic compromise. He agreed Dr. Fineburg reported back pain radiating from the lower back into Claimant's "legs," which would indicate both legs. He admitted Claimant reported continuing problems since his injury with Employer, "and he had problems clear up through his physical therapy, and I think the physical therapist announced him cured, or was kind of hoping he was cured, but I don't think he was cured." He noted patients normally relate a specific situation which cause symptoms such as those Claimant experienced on December 13, 1999. (CX-34, pp. 81-88).

Dr. McCloskey could not opine exactly when Claimant suffered an injury to his disc at L5-S1. Surgery for the condition and osteophytes which were observed during surgery could not establish when the condition at L5-S1 occurred. Likewise, Dr. McCloskey noted he had no information regarding Claimant's back to determine if Claimant suffered an injury at L5-S1 prior to the termination of his physical therapy. According to Dr. McCloskey, Claimant's ability to lift 42 pounds at the termination of his physical therapy does not preclude a finding of a disc bulge or back problems. (CX-34, pp. 88-90).

Nevertheless, Dr. McCloskey, who noted Claimant did not report any specific situation at P&T which caused any symptoms or worsening of an ongoing problem, concluded Claimant's condition at L5 began with his job injury while working for Employer. At some point, Claimant's condition ameliorated upon concluding physical therapy; however, "left sciatica" developed as "a result of that original back injury." Although he indicated the appearance of Claimant's left-sided pain may have been latent, Dr. McCloskey opined the left-sided pain could be the natural progression of Claimant's original job injury with Employer. (CX-34, pp. 90-93).

Dr. McCloskey concluded, "I think all along, [Claimant's] problem was at the L-5 disc." His opinion is unaffected by Dr. Fineburg's November 1999 report indicating full range of motion and no evidence of neurological defect. He opined Claimant's history of ongoing back complaints provided to Dr. Fineburg was consistent with the history he received from Claimant on December 13, 1999. (CX-34, pp. 93-95).

After Claimant's first surgery in March 2000, Claimant did not need crutches. (CX-34, p. 76). By July 2000, Claimant was ready to return to work, although Claimant did not indicate what

type of work he would perform.[24] His records at that time indicate "Claimant knows not to do any heavy lifting." By September 19, 2001, Claimant was doing "pretty good." Dr. McCloskey assigned a ten-percent impairment rating and restricted Claimant from heavy, strenuous, or overhead work. (CX-34, pp. 94-96).

After Claimant's October 2000 hip injury, Dr. McCloskey performed surgery which revealed mainly scar and material related to Claimant's bulging disc. There was no way for Dr. McCloskey to know if his surgery on Claimant was the result of some form of trauma to the disc area. (CX-34, pp. 98-99).

Dr. McCloskey opined Claimant's hip injury worsened Claimant's condition which necessitated the December 2000 surgery. Thus, he opined the December 2000 surgery was "occasioned by this fall." Likewise, Dr. McCloskey opined Claimant's March 3, 2001 automobile accident resulted in Claimant's January 18, 2002 surgery.[25] (CX-34, pp. 99-100).

Dr. McCloskey opined Claimant is not permanently and totally disabled from returning to work within the restrictions indicated in Claimant's January 2003 FCE. He believed Claimant could have returned to work within those restrictions when he released Claimant in 2000. Dr. McCloskey opined Claimant was occupationally disabled after his job injury with Employer until his return to work with P&T. He opined Claimant suffered chronic back pain after his job injury with Employer through the time he began treating Claimant on December 13, 1999, as evidenced by Claimant's complaints to him and other treating physicians and his medical and physical therapy records. Dr. McCloskey further opined Claimant's chronic back pain and disc condition at L5-S1 existed prior to Claimant's employment with P&T. (Tr. 100-104).

---

[24] Claimant denied telling Dr. McCloskey or anybody at the doctor's office he was working for any company in July 2000. He was painting his house. (EX-20, p. 75).

[25] On January 14, 2002, Claimant reported to Dr. McCloskey that a motor vehicle accident stirred up his current difficulty, which was subsequently "much worse." (EX-14, pp. 49-51). Claimant's May 4, 2001 MRI indicated post-surgical changes and a left laminectomy defect with enhancing fibrosis. (EX-14, p. 81). His January 14, 2002 CT scan and myelogram revealed a large left-sided defect at L5-S1, which increased since December 14, 2001. (EX-14, pp. 55-56).

On questioning by Claimant's counsel, Dr. McCloskey opined Claimant's March 2000 surgery left him pre-disposed to suffer greater injury from "subsequent ordinary bumps and incidents of life that would not otherwise . . . require surgery." Dr. McCloskey could not determine whether Claimant's Fall 2000 hip injury would have required surgery in a person who sustained no previous injury, because he had no details of the injury, which "evidently caused some trouble and made it necessary for another surgery." He added that Oxycontin, a "heavy narcotic," may be indicative of "serious ongoing pain." Ordinarily, use of the drug, which could interfere with an individual's ability to work a 40-hour week, warrants limitations, but it depends on the individual. (CX-34, pp. 106-107).

Dr. Victor T. Bazzone, M.D.

On November 22, 2002, the parties deposed Dr. Bazzone, a neurosurgeon who has practiced since 1974. He was asked to evaluate Claimant's condition based on Claimant's medical records and depositions. (PTX-28).

Dr. Bazzone testified he could render an opinion without personally treating Claimant, based on the medical records and depositions. He would not defer to Drs. Fineburg or McCloskey, Claimant's treating physicians, for an opinion on whether Claimant suffered an injury, aggravation or exacerbation. According to Dr. Bazzone, his ability to render an opinion is not diminished by failing to treat Claimant because physicians, who place different emphasis on various aspects of medical records, regularly evaluate patients based on records. (PTX-28, pp. 31-34).

Dr. Bazzone opined the original physical abnormality in this matter was a herniated disc at L5-S1 on the left, based on an MRI and clinical findings. Lifting a 100-pound fan may cause such an injury. He opined Claimant's injury for Employer was the "inciting incident" which caused the condition. (PTX-28, pp. 7-9). Dr. Bazzone concluded Claimant's condition and treatment is the result of the natural progression of the underlying defect or disease. (PTX-28, p. 18).

Dr. Bazzone opined Claimant's work with P&T merely intermittently and temporarily exacerbated his condition, which was caused by Claimant's job injury with Employer that resulted in the need for surgery. (PTX-28, pp. 9-10). His opinion is unaffected by the physical therapy records, which were reported while Claimant was under the influence of various drugs, including Soma, Flexeril, Anaprox, Ultram, and Skelaxin, during

the entire time. Dr. Bazzone has "no doubt" that any combination of the drugs would have a greater effect than taking any drug alone. Likewise, he had "no doubt" that the drugs would "at least dull the effects of physical symptoms or problems." (PTX-28, pp. 12-17).

Dr. Bazzone noted clinical findings reported on a physical examination do not always comport with results of diagnostic tests such as MRIs or myelograms. Such findings vary during the day, every day. (PTX-28, p. 18).

On cross-examination, Dr. Bazzone opined a "myriad of things" may cause a ruptured disc, including merely sneezing. He has treated people with bulging discs who are asymptomatic. (PTX-28, pp. 26-27). Based on Claimant's deposition and medical records, he concluded Claimant was able to work at P&T because he took pain medication during that time. (PTX-28, pp. 30-31).

Dr. Charlton H. Barnes, M.D.

On November 8, 2000, Claimant treated with Dr. Barnes for left hip and leg pain with numbness down the back of his leg. Claimant reported receiving treatment at the emergency room after injuring his hips three weeks earlier. Claimant walked using a cane. X-ray examination revealed a chip fracture in his left hip that might need surgery if no improvement was reported. (PTX-16, p. 21).

On November 20, 2000, Claimant reported difficulty walking since sustaining his hip injury five weeks earlier. Dr. Barnes concluded Claimant injured his sciatic nerve when he sustained his hip injury. Id. at 20.

Thereafter, Claimant's hip condition did not improve. Id. at 13-19. CAT scans revealed arthritis in Claimant's left hip, which was diagnosed on April 18, 2001 as "arthritis secondary to a car accident." Id. at 11, 13. Claimant underwent arthroscopic surgery on May 22, 2001, when gouty deposits were revealed in his left hip. Id. at 25. On June 5, 2001, after Claimant's hip condition failed to improve, Dr. Barnes diagnosed rheumatoid arthritis and left hip difficulty. Id. at 4-12.

Dr. M. F. Longnecker, Jr. M.D.

On November 28, 2000, Claimant reported to Dr. Longnecker that he noticed improvement in left leg pain after he underwent surgery with Dr. McCloskey. The wound "healed uneventfully and [Claimant] was getting around reasonably well until a couple of

months ago." Claimant, who reported "severe pain down the left leg," was "now having to walk with crutches." Dr. Longnecker noted, "In further questioning, he states there was really no problems in surgery that he is aware of. Again, he was doing well until the incident [Fall 2000 hip injury] happened a month or so ago." Dr. Longnecker ordered an MRI. (EX-21, p. 3).

On December 4, 2000, Dr. Longnecker noted Claimant's MRI revealed a large defect at "L1-2 on the left side. He has some stenosis distal, probably in the area where it was operated." Dr. Longnecker opined Claimant would "need something done," and reported Claimant was scheduled to treat with Dr. McCloskey. Id.

Dr. Jeffrey Laseter, M.D.

On August 14, 2001, Claimant reported to Dr. Laseter that he improved after a March 2000 diskectomy, but continued to have problems until a December 31, 2000 surgery. After that, he was "actually doing well" until a motor vehicle accident. Since the accident, "he continues to have problems" with increasing pain. (EX-14, pp. 252-253; EX-22, p. 2).

Gregory Ball, P.T.

On October 31, 2002, Mr. Ball was deposed by the parties. He is a physical therapist who administered Claimant's physical therapy beginning on June 1, 1999. Claimant reported primarily right-sided complaints of back pain following a back injury after lifting a 100-pound fan for Employer. (EX-28, pp. 7-8).

Claimant's condition generally improved with physical therapy until June 30, 1999, when he reported pain after moving a lawnmower. His incident with the lawn mower "set him back" for a short period of time. (EX-28, pp. 8-19). Thereafter, Claimant's condition improved with physical therapy until Mr. Ball reported Claimant could return to work on July 28, 1999. Dr. Fineburg received the report but ordered additional physical therapy. Id. at 20-23. Claimant's condition continued to improve through August 27, 1999, when Claimant reported no complaints of pain and could return to work. Mr. Ball has not treated Claimant since August 27, 1999. Id. at 23-30.

On cross-examination, Mr. Ball admitted he was unaware Claimant visited the emergency room on June 3, 1999, when Claimant also received physical therapy. He was unaware of what medications Claimant was taking during the entire period of physical therapy and did not factor such drug use into his evaluations of Claimant. According to Mr. Ball, drug use during physical therapy could "always influence your findings." Id. at

33-37. Because Claimant appeared to improve during physical therapy, Mr. Ball did not think to ask about drug use. Id. at 65.

Mr. Ball performed no physical examination of Claimant. He provided no sensory motor testing other than hamstring strength tests, which may not result in the same symptoms with a straight-leg raise. Id. at 37.

Mr. Ball noted Claimant "wasn't the best at conversation or reporting problems at all times," nor was Claimant "the best in terms of describing things. He didn't seem to be very educated." Mr. Ball acknowledged Claimant's results were based on personal observation rather than using machines or performing examinations to objectively quantify pain and mobility restrictions. Mr. Ball relied on "nothing other than his reports and in our motion testing and provocation of pain and how well he's able to walk." Id. at 37-38.

Mr. Ball noted Claimant's physical therapy sessions lasted one hour or less and were provided under controlled conditions which were not strenuous. He acknowledged Claimant returned for treatment with Dr. Fineburg after one incident of lifting or moving a lawnmower while his condition was improving during physical therapy. He admitted Claimant's failure to report pain did not mean he did not have pain. Id. at 46-49, 53.

Mr. Ball acknowledged he had no job description regarding Claimant's prior occupation when he returned Claimant to work. He believed Claimant could return to "some type of work activity." He did not identify whether Claimant could return to light or regular duty, because "I kind of left that up to Dr. Fineburg." Id. at 49-50. He noted patients in Claimant's condition are "always" returned to their physician prior to a release to return to work after concluding physical therapy, but Claimant was not directed to return to a physician on August 27, 1999, when Mr. Ball concluded Claimant could return to work. Id. at 58-59.

Functional Capacity Evaluations

On April 30, 2002, Claimant's FCE, which was reported by Ruth Bosarge, P.T., C.M.D.T., indicated Claimant did not qualify for sedentary work, due to intolerance for sitting, standing, and walking to perform sedentary work. Claimant exhibited signs of symptom magnification, but Waddell signs were negative. Claimant's physical requirements at his former job with Employer were not described. (CX-34, exh. no. 6).

On January 13, 2003, Claimant was referred by Employer/Carrier's counsel to Healthsouth, which provided an FCE reported by Danielle Kirkpatrick-Cullifer, P.T., and Brandon Cloud, P.T.A. Claimant displayed self-limiting behavior and symptom magnification. He did not want to perform too much activity for fear of going to the hospital. Physiologic responses of heart rate and respirations inconsistently did not increase with reports of increased pain. Claimant was classified within the light physical demand category, allowing him to exert up to 20 pounds of force occasionally, 10 pounds of force frequently, and a negligible amount of force constantly to move objects. Claimant's former job requirements with Employer were not described. (CX-34, exh. no. 7).

Claimant could frequently sit for thirty minute periods of time. He could occasionally push, pull, stand, walk, climb regular stairs, stoop, crouch, reach overhead and at the desk level, twist, and firmly or simply grasp objects with his right and left hands. He could occasionally carry ten pounds and lift ten pounds overhead, while he was able to occasionally lift 20 pounds from floor to knuckle and from knuckle to shoulder. Id. at 2-8.

The Vocational Evidence

Christopher Ty Pennington

On March 10, 2003, the parties deposed Mr. Pennington, a certified rehabilitation counselor who prepared a labor market survey on February 11, 2003. On October 4, 2001, he interviewed Claimant after reviewing Claimant's medical records and related depositions.[26] Together, they discussed Claimant's personal, social, educational, vocational, and medical histories to determine Claimant's transferrable skills. Claimant reported some college experience and "military time." He reported having a standard Mississippi driver's license and access to a dependable car; however, he would drive short distances only. Mr. Pennington did not indicate whether he performed any testing establishing Claimant's abilities to type, use computers, perform mathematical calculations or handle money. (PTX-38, pp. 4-9). Mr. Pennington did not follow-up with Claimant, who subsequently underwent surgery. (PTX-38, pp. 14-15).

[26] He noted Claimant was undergoing medical treatment and apparently had not reached maximum medical improvement. (PTX-38, exh. no. 2, p. 1).

To prepare his labor market survey, Mr. Pennington reviewed Claimant's January 2003 functional capacity evaluation, Dr. McCloskey's deposition, and considered Claimant's history of drug use. (PTX-38, pp. 26-27). He was not sure if he ever placed individuals taking Oxycontin in jobs. He was unsure what dosage of Oxycontin Claimant was taking at the time, and noted the drug would impair Claimant to some extent. He would defer to a physician for restrictions on the basis of Oxycontin use. He noted Claimant, who was taking medication at their interview, exhibited good communication skills. (PTX-38, pp. 26-29).

According to Mr. Pennington, Claimant demonstrated the ability to be "a trainable person" with a high school diploma, college background, approximately five years of experience supervising other employees for a previous employer, carpentry experience, and other experience in the paint industry. Mr. Pennington identified available "jobs in the category of sedentary to light-level work." Some of the jobs offered on-the-job training. Some of the jobs had "current or periodic openings in 1999 at the time of [Claimant's] injury. Some of the rates of pay for the available jobs in 1999 were different than present wages for the same jobs. (PTX-38, pp. 14-18).

Mr. Pennington opined all of the jobs in his labor market survey were within Claimant's physical restrictions and limitations. Some of the jobs, such as a dispatcher, sweeper driver and order clerk, were sedentary jobs in which "he would sit throughout the majority of the workday." The jobs provided the opportunity to stand up and take breaks. Mr. Pennington indicated Claimant may not have the background to immediately accept employment for dispatcher or order clerk jobs, but has the ability to be trained for the jobs. (PTX-38, pp. 29-31).

On cross-examination, Mr. Pennington noted some of the available jobs did not require the operation of machinery and automobiles and were available with: City of Pascagoula, Sears Telecenter, Central Parking, Murphy USA, City of Biloxi, Harbor Freight Tools, Magnolia Security, and Pinkerton Security. (PTX-38, pp. 31-33). None of the jobs were law-enforcement jobs requiring completion of specialized training or operating a firearm. The City of Biloxi dispatcher job may require the use of a computer. A job as an inspector for PFG Precision Optics (PFG) might require operation of a machine; however, available jobs as an assembler would require machine operation.[27] Such

[27] PFG's assembler positions are "more like machine operators that calculate . . . diameters and depths . . . of the lenses that they need." (PTX-38, p. 25).

jobs constitute about 95 percent of PFG's workforce. (PTX-38, pp. 34-38).

Labor Market Survey

On February 11, 2003, Mr. Pennington identified jobs with nine employers who indicated "current or periodic openings" within Claimant's restrictions noted in his January 13, 2003 FCE. The FCE reported Claimant's abilities to function at light or lower exertional level jobs, to exert up to 20 pounds of force occasionally and 10 pounds frequently.

The City of Pascagoula, Mississippi, was currently seeking two individuals for Police Dispatcher positions to receive police and fire calls and dispatch the correct department to render necessary services. The job required a high school diploma or equivalent and certification within a specified time period outlined within training requirements. Employer would provide on-the-job training and help with post-employment certification. The worker would be required to reach and handle. Potential annual salary was estimated from $20,418.00 to $30,168.00 (PTX-38, exh. no. 2, p. 3).

Van Elmore Services, in Mobile, Alabama, was hiring for sweeper drivers. The position required an applicant to reach and handle for the job which allowed a worker to sit throughout most of the workday. The job required filling water tanks from a hydrant and pulling levers to activate rotary brushes and water sprayers. The job was considered light-duty, required no high school diploma, and paid $7.00 per hour. The employer would provide training on the job. Id.

Sears Telecenter, in Mobile, Alabama, was currently hiring for Order Clerks, who handle customer requests for replacement parts and accessories of Sears merchandise. The work, which involved occasional reaching, handling, and computer entry, was classified as sedentary, indicating a "worker will sit through the workday." The job required a high-school diploma or equivalent, excellent customer skills, and paid $7.89 per hour. The employer trains its employees to learn its computer system and perform data entry. Id.

Central Parking System, in Mobile Alabama, was hiring for attendants who assign parking tags, calculate fees and handle money. The position was sedentary, requiring workers to sit in a booth throughout each workday. Applicants must pass a background check. Starting salary was $5.15 an hour. Id.

Murphy USA, in Lucedale, Mississippi, offered a cashier position which required an employee to operate a cash register and monitor gas pumps. The job was classified as sedentary. An applicant must possess strong customer service skills and solid basic math skills. Starting salary was estimated at $6.00 to $6.50 per hour. Id. at pp. 3-4.

Sickle Cell Disease Association, in Mobile, Alabama, was hiring a driver to transport clients and students. The job was considered light-level work. Salary was not disclosed, but Mr. Pennington's experience indicated the position paid an entry-level salary of $6.00 an hour or higher. Id. at 4.

Harbor Freight Tools, in Mobile, Alabama, offered a position as a Clerk/Cashier which required the employee to perform light stocking and to total receipts at the end of the day. The position was considered light-level and required lifting up to twenty pounds and occasional bending and stooping. Applicants would operate a cash register and receive cash payments for tools and equipment. Starting salary was estimated at $6.00 to $7.00 per hour. Id.

The City of Biloxi, Mississippi, was taking applications for dispatchers to receive incoming calls and direct callers to the appropriate fire or police department. The job was classified as sedentary and required a high school diploma or equivalent. Applicants were required to pass a minimum typing and number test. The job paid $10.79 per hour. Id.

Magnolia Security of Pascagoula, Mississippi, was hiring for positions as a security guard and gate guard for various assignments from Moss Point to Gulfport. An applicant was not required to make rounds, but was normally assigned tasks of guarding construction sites. The positions required occasional bending and stooping and frequent reaching and handling. Starting salary was estimated at $6.00 to $7.00 per hour. Id.

Mr. Pennington identified jobs with seven employers which indicated "current or periodic openings" in 1999 when Claimant was injured (retroactive jobs). (PTX-38, exh. no. 2, pp. 2, 4-6). Swetman Security of Biloxi, Mississippi, identified positions available for gate guards. The jobs were classified as sedentary-light work which allowed alternating sitting and standing. The applicant would check credentials and authorizations to permit entry of individuals to and from commercial locations. Starting salary was $5.50 to $7.00 per hour. Id. at 4-5.

PFG of Ocean Springs, Mississippi, identified jobs for assemblers and inspectors. Assemblers performed at the sedentary to heavy exertional level, although the majority of assembly positions were light in nature. Inspectors would sit at workbenches to examine products and ensure compliance with specifications. An inspector position was considered sedentary. Assemblers and inspectors earned a starting salary of $6.75 per hour. Id. at 5.

President Casino offered positions for shuttle bus drivers responsible for transporting employees and clients to and from parking lots, a hotel airport and campground areas. A commercial driver's license (CDL) was required. The buses are equipped with automatic transmissions which require no use of the left foot to operate a clutch. Starting salary was estimated at $7.00 per hour. Id.

The City of Biloxi offered positions as dispatchers, requiring minimum typing and number tests. Starting salary was $10.79 per hour. Id.

All American Towing of Biloxi, Mississippi, indicated dispatcher positions were available, paying $5.50 to $6.00 per hour. The worker was required to receive telephone and radio reports of driving difficulties, dispatch drivers to specific locations, maintain logs of scheduled runs, trucks and drivers. The job was considered sedentary to light-duty. Id.

Grand Casino of Biloxi, Mississippi, was hiring shuttle bus drivers. The positions were considered light-level and paid $6.10 per hour, plus tips. Id. at 5-6.

Pinkerton Security of Pascagoula, Mississippi, offered jobs for full-time and part-time security officers and gate guards. Starting salary was estimated at $5.15 to $6.00 per hour depending on the location. The majority of assignments included walking twenty to thirty minute rounds each hour to observe hazards and trespassers. The applicant must possess a clean felony record and pass a drug screen. Id. at 6.

The Contentions of the Parties

Claimant contends he received no disability compensation benefits or medical benefits following his May 5, 1999 back injury while working for Employer. After his termination from Employer, he began working lighter-duty employment for P&T. There, he claims he re-injured himself or sustained a serious new injury, noting Dr. Bazzone opined all of his symptoms are related

to his original May 5, 1999 injury. He argues his surgeries were the result of his original industrial injury while working for Employer or a severe aggravation of his injury while working for P&T. He concedes he suffered other injuries after working for Employer and P&T, but denies they were anything more than temporary exacerbations of his post-injury or post-aggravation condition. Claimant argues he is permanently and totally disabled and seeks compensation and medical benefits, attorney's fees, penalties and interest.

Employer/Carrier assert Claimant failed to immediately report his claim related to his alleged May 5, 1999 injury. They argue Claimant reported only right-sided pain to his physicians and physical therapists after his employment with Employer. After he began working with P&T, he received treatment and surgeries from Dr. McCloskey, who reported complaints of left-sided pain and a bulging disc on the left side of Claimant's spine. They argue Claimant did not receive surgery until after he began working with P&T. Employer/Carrier dispute the accuracy of Dr. Bazzone's opinion that Claimant's symptoms are entirely related to his alleged May 5, 1999 injury and argue Dr. Fineburg opined Claimant suffered a new injury while working for P&T.

Employer/Carrier also aver that suitable alternative employment was available to Claimant within his restrictions. They assert Claimant's surgeries and additional medical treatment were the result of independent intervening accidents, which terminate their liability for his work-related condition.

Joined Party/Carriers submit Claimant was injured while working for Employer, which terminated him because of his work-related condition. They argue Claimant was precluded from returning to heavy-duty employment by his physician and physical therapists after his May 5, 1999 injury. Thereafter, they assert Claimant was on medication which "masked" his symptoms while he worked light-duty for P&T. They contend Claimant suffered only temporary exacerbations of his back pain when he infrequently worked with an insulation product, Kaylo, while working for P&T.

Joined Party/Carriers argue Claimant never notified them or any co-worker of any job injury nor reported to any physician or therapist any job injury he allegedly suffered while working for P&T. They assert P&T terminated Claimant due to his unacceptable work performance which was caused by "spending half the night out and then coming to work." Thus, they contend Claimant never suffered any injury or aggravation, exacerbation, or worsening of his condition while working for P&T. Based on the opinion of Dr. Bazzone, they assert Claimant's symptoms were the natural

progression of his work-related condition after his May 5, 1999 injury while working with Employer, and they have no liability to Claimant. They contend Claimant suffered independent intervening injuries which terminate further liability for his work-related condition.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I found Claimant's hearing testimony generally unequivocal and credible. He at times provided inconsistencies with his prior deposition testimony that detracts from his overall

demeanor and believability. I did not observe any deliberate efforts at deception or dishonesty.

Employer/Carrier and Joined Party/Carriers argue Claimant's credibility is questionable because of his inability to report injuries or recall matters consistently in his depositions and at the hearing. The record establishes Claimant is a poor historian. I find Claimant's factual inconsistencies do not diminish the fact of his injury, which was objectively reported through MRI and X-ray examination. Accordingly, I am not persuaded to entirely discredit Claimant for factual inconsistencies in his testimony.

However, certain matters to which Claimant testified and which are germane to this matter are not corroborated by other witnesses nor confirmed through objective medical records. Further, Claimant's testimony was at times vacillating.

In his first deposition of August 15, 2000, Claimant related his back condition entirely to his job injury with Employer, but was silent on his subsequent work history and job description with P&T. In his second deposition of August 10, 2001, he recalled working with P&T and the Kaylo material; however, he described the work as "light duty," a description he used to describe his work with P&T to Dr. McCloskey. He added in his deposition that his work with rubber was "light duty" and "gravy," requiring him only to carry a tape measure and a knife. He noted other workers carried his boxes of rubber insulation or otherwise carried boxes of Kaylo, which he usually lifted by the piece rather than by the box-load. However, he testified at the hearing he was required to lift one hundred-pound boxes of Kaylo. Without any corroborating facts in the record, Claimant's evolving testimonial job description renders his testimony that his back condition is related to his job with P&T unpersuasive and otherwise unhelpful for a resolution of this matter.

Likewise, in his first deposition, Claimant failed to mention any complaints of injuries while working with P&T or the Kaylo material. He failed to report any such complaints to his treating physicians. Claimant's failure to call any witnesses to whom he reportedly complained of increased symptoms to explicate the circumstances of his increased pain while working for P&T further diminishes the probative value of his testimony regarding the use of Kaylo and its effects on his symptoms.

On the other hand, Employer produced the hearing testimony of Claimant's supervisor, Mr. Dixon, who unequivocally and persuasively testified Claimant performed his job using Kaylo

without any complications or difficulties. Mr. Dixon's testimony that other employees were available to move Kaylo, which was primarily cut by Claimant, is consistent with Claimant's earlier deposition testimony and undermines Claimant's hearing testimony regarding his use of Kaylo.

It should be noted that Mr. Dixon's testimony regarding Claimant's termination from P&T is not persuasive in establishing Claimant was terminated for late-night partying activities. Mr. Dixon admitted he never observed Claimant out at night. Rather, he based his decision on Claimant's tired appearance in the mornings. The physicians' testimony of record establishes that Claimant's use of his medications or any combinations of them can increase the sedative effect of the drugs. Claimant testified he was taking the medications while he was performing work with P&T. Consequently, I am unpersuaded by Mr. Dixon's testimony which has no factual support in the record establishing Claimant was terminated for late-night partying.

Claimant's testimony regarding his symptoms was equivocal. His deposition testimony clearly indicated that he experienced pain on his **left** side after he sustained an injury for Employer; however, at the hearing, Claimant indicated his left-sided pain appeared only after working for P&T. Similarly, in his deposition, he unequivocally related his pain to the specific job injury with Employer; however, he indicated at the hearing that he believed his symptoms did not manifest until after his employment with P&T, with whom he could not identify any particular injury causing his complaints. At the hearing, Claimant testified his deposition testimony concerning the facts of his injury for Employer and consequent symptoms of ongoing and continuous pain in his left leg, hip and back was correct.

Claimant's deposition testimony regarding his symptoms is more credible and persuasive. The deposition testimony was temporally closer to the dates of his employment and injury. Claimant repeatedly explained his left-sided pain occurred after his May 5, 1999 job injury, which he clearly identified as the cause of his complaints. Consequently, Claimant's hearing testimony is unpersuasive in establishing Claimant experienced no left-sided pain after his May 5, 1999 injury or that he failed to relate his symptoms to his May 5, 1999 job injury.

P&T argues Claimant's physical therapy records and the opinions of Mr. Ball are unreliable, and I agree. The physical therapist candidly professed ignorance of Claimant's drug use during physical therapy. He unequivocally stated such drug use would "always influence" findings. He acknowledged Claimant's

failure to report pain did not mean he was pain-free, which diminishes the persuasiveness of the physical therapy reports that were based on Claimant's reports of pain rather than objective testing.

The opinions of Drs. Bazzone and McCloskey buttress Mr. Ball's testimony that pain medications would impact physical therapy results. Dr. Bazzone had "no doubt" drug use would affect Claimant's performance, while Dr. McCloskey opined medications may improve performance during physical therapy. Accordingly, I find Claimant's physical therapy records are not useful for a resolution of the instant matter.

I am unpersuaded by Employer/Carrier's argument that the opinions of Dr. Bazzone should be discredited because he did not treat or evaluate Claimant personally. Dr. Bazzone's failure to personally treat or evaluate Claimant does not diminish his ability to render a medical opinion based on his expertise, experience, and excellent credentials. He was provided substantial medical records and deposition transcripts to render his opinion, which I find is useful for a resolution of the issues in the instant matter.

On the other hand, Dr. Fineburg's opinion regarding Claimant's condition post-injury and post-physical therapy was not formed with the understanding Claimant was using a variety of prescription medications during treatment. Dr. Fineburg failed to physically examine Claimant post-therapy to conclude Claimant, who reported no post-therapy improvement, was asymptomatic and had recovered. Rather, he relied on the reports of a physical therapist who performed no physical examinations and who was also unaware of Claimant's drug use during therapy. Although Dr. Fineburg opined Claimant's medications or combinations of medications would not "mask" symptoms of pain, I find his opinion unpersuasive in light of the opinions of Drs. Bazzone and McCloskey, who indicated such medications would diminish symptoms and dull their effects.

Accordingly, I find the opinions of Dr. Fineburg are unpersuasive and not well-reasoned or entitled to greater weight as the opinions of a treating physician. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000).

Likewise, Dr. McCloskey's opinions regarding Claimant's allegedly improved condition after physical therapy are unpersuasive. He admitted he was given only a limited history of Claimant's drug use upon providing medical treatment, which

diminishes the probative value of his opinions regarding Claimant's condition after physical therapy.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends he suffered continuous and ongoing pain in his back and legs after he was injured on May 5, 1999, when he was allegedly lifting a one hundred-pound fan for Employer. Employer/Carrier contend Claimant failed to report a job injury in May 1999, and his condition is the result of subsequent employment with P&T. Joined Party/Carriers assert Claimant's condition is the result of his May 5, 1999 job injury while working for Employer.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel

Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

a. Claimant's May 5, 1995 Job Injury with Employer

In the present matter, Claimant's testimony regarding the fact of his May 5, 1999 injury is uncontroverted. Although Employer/Carrier argue Claimant failed to report his alleged job injury immediately, they do not challenge the accuracy of Claimant's testimony that he was injured while lifting a one hundred-pound fan onto scaffolding. Further, there is insufficient evidence of record establishing his working conditions and activities on that date could not have caused the harm or pain sufficient to invoke the Section 20(a) presumption.

Claimant credibly described pain in his back and legs after sustaining an injury while lifting a fan for Employer. He reported the symptoms and history of injury to the various physicians of record, who agree lifting a one hundred-pound fan may cause a ruptured disc which could cause Claimant's complaints. Drs. McCloskey and Fineburg agree Claimant was occupationally disabled post-injury. Dr. McCloskey specifically opined Claimant's condition was consistent with his history of a May 1999 injury with Employer, while Dr. Bazzone concluded Claimant's injury with Employer was the inciting event which caused Claimant's symptoms. Dr. Fineburg concluded Claimant could have suffered from a bulging disc without evidence of neurological deficit on physical examination. Meanwhile, Claimant's MRI unquestionably indicated objective evidence of a herniated disc at L5-S1 which required surgical intervention.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on May 5, 1999, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

b. Claimant's Alleged Job Injury with P&T

Claimant's alleged injuries with P&T find no factual support in the record. As noted above, Claimant's persuasiveness and credibility regarding alleged complaints of pain and his alleged job description with P&T were impugned by his inconsistent, uncorroborated testimony that was refuted by his former supervisor. His failure to report any history of injury with P&T to his treating physicians or in his original deposition arguably indicates that his alleged symptoms, if any, were of no

importance to Claimant and further diminishes the persuasiveness of his testimony that he suffered any harm with P&T.

Thus, Claimant has failed to establish a **prima facie** case that he suffered an "injury" with P&T under the Act. He failed to establish that he suffered a harm or pain from any particular accident and that his working conditions and activities on any occasion could have caused the harm or pain sufficient to invoke the Section 20(a) presumption.

c. Claimant's Hip and Shoulder Complaints

Claimant did not relate his hip and shoulder complaints to his work injury, but would defer to Dr. McCloskey's opinion that the hip condition was work-related if Dr. McCloskey would so opine. There is no opinion from Dr. McCloskey that Claimant's hip complaints or shoulder complaints are work-related. Likewise, there is no opinion in the record that such complaints are work-related. Dr. Barnes specifically diagnosed Claimant's hip condition as arthritis secondary to a car accident. Accordingly, I find Claimant failed to establish he suffered hip and shoulder injuries and that his working conditions could have caused the harm or pain. Therefore, he is not entitled to the Section 20(a) presumption regarding his hip and shoulder complaints.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); See Ortco Contractors, Inc. v. Charpentier, WL 21185785 **2 (5th Cir. May 21, 2003)(the evidentiary standard to overcome a Section 20(a) presumption is less demanding than the ordinary civil

requirement that a party prove a fact by a preponderance of evidence).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Dr. Fineburg opined Claimant suffered from an aggravation or a new injury while working for P&T, which severs the causal connection between his condition and work-related injury. Accordingly, I find Employer/Carrier rebutted the Section 20(a) presumption and the record must be weighed as a whole for a resolution of the matter.

3. Weighing the Evidence of Record

In the present matter, Employer/Carrier failed to establish Claimant's condition was not caused by his injury and working conditions while employed with Employer. Although Dr. Fineburg, who admitted he was unaware of Claimant's drug use during

treatment and therapy, appeared to opine Claimant sustained an aggravation or a new injury while working for P&T, his opinion was equivocal. He later opined he could not render an opinion on what caused Claimant's condition, which could be the natural progression of a small defect in the annulus of Claimant's spine.

Despite Dr. Fineburg's opinion elsewhere that Claimant was pain-free and could return to work after physical therapy, his testimony and medical records establish he diagnosed Claimant with chronic back pain, which can be disabling, after Claimant suffered his initial injury with Employer and completed physical therapy, which Claimant reported did not improve his condition. His opinion indicates Claimant was occupationally disabled after his job injury for Employer. Consequently, Dr. Fineburg's opinion is not persuasive in establishing that Claimant's work events with Employer did not directly cause his injury nor aggravate a pre-existing condition resulting in injury or pain.

Likewise, Dr. Fineburg's opinion is not persuasive in establishing Claimant's work events with P&T directly caused his injury or aggravated a pre-existing condition resulting in injury or pain. Dr. Fineburg could identify no injury Claimant sustained with P&T which caused Claimant's alleged increase in symptoms or an aggravation of his pre-existing injury. He relied upon reports of a physical therapist rather than an objective medical examination to conclude that Claimant's condition resolved after being asymptomatic upon the completion of physical therapy.

The testimony of the physical therapist is persuasive in establishing Claimant may have continued to experience ongoing pain despite reports of being pain-free. The therapist noted Claimant's findings would always be influenced by drug use, which was not reported during therapy. He admitted physical therapy reports were not based upon any physical examinations of Claimant. Moreover, the therapist's testimony indicated Claimant should have treated with Dr. Fineburg before he was returned to work, because patients are "always" returned to their physicians before a release to return to work.

Meanwhile, Claimant's testimony and Dr. Fineburg's medical evidence establish Claimant reported no improvement after undergoing physical therapy. Dr. Fineburg admitted Claimant's herniated disc, which was indicated on his MRI, could have been present when he examined Claimant, despite physical findings of no neurological defects. Thus, there is no factual support for Dr. Fineburg's conclusion that Claimant was asymptomatic after his original injury. Accordingly, I find Dr. Fineburg's opinion

that Claimant may have suffered an aggravation or a new injury while working for P&T is not well-reasoned nor persuasive in establishing Claimant's job injury while working with Employer did not cause his condition nor aggravate a pre-existing condition.

On the other hand, Dr. Bazzone's testimony is persuasive in establishing Claimant's condition was the result of his May 5, 1999 injury with Employer. He unequivocally and persuasively opined Claimant's original physical abnormality was a herniated disc at L5-S1, based on Claimant's MRI and clinical findings. Likewise, he opined Claimant's condition was consistent with his history of a May 5, 1999 injury while lifting a fan for Employer. He opined Claimant's condition did not improve post-injury despite physical therapy and ongoing employment because Claimant was taking prescription medication.

Dr. Bazzone's opinion is buttressed by Dr. McCloskey's consistent opinion. Dr. McCloskey, Claimant's treating physician who provided surgical treatment, opined that Claimant's problem "all along" was at the L5 disc, which became problematic while Claimant worked with Employer. He opined Claimant was occupationally disabled after his job injury with Employer and added Claimant's ability to perform at work or during physical therapy would be improved with post-injury drug use.

Accordingly, I find the opinions of Drs. Bazzone and McCloskey persuasive in establishing Claimant's condition was caused by his May 5, 1999 job injury with Employer. Employer/Carrier are therefore liable for Claimant's post-injury condition.

Insofar as Employer/Carrier argue Claimant's condition was aggravated, exacerbated, or worsened by his employment with P&T because of an alleged latent appearance of left-sided pain, I find their argument without merit. The parties are in agreement Claimant was taking prescription medication for his condition during the entire period from post-injury medical treatment and physical therapy through the period of his employment with P&T. The opinions of Drs. Bazzone and McCloskey are persuasive in establishing such drug use would diminish or dull the effects of symptoms or problems.

Dr. McCloskey, who discussed the appearance of sciatica on Claimant's left side, unequivocally opined Claimant's original injury could cause complaints on both sides of his back and that Claimant's left-sided complaints could be the natural progression of his May 5, 1999 job injury with Employer. Claimant repeatedly

testified he experienced pain on his left and right sides after his May 5, 1999 injury, while left paraspinal tenderness was reported by Dr. Passyn on May 24, 1999.

Meanwhile, the physical therapist who reported right-sided pain during physical therapy noted Claimant was not proficient at describing his complaints. Although the therapist's notes indicate Claimant was pain-free, which would not necessarily mean Claimant was without pain according to Dr. McCloskey and the therapist, freedom from symptoms is not an indication that a bulging disc has resolved or healed according to Dr. McCloskey. Accordingly, I am not persuaded Claimant's condition was aggravated, exacerbated, or worsened by his employment with P&T because of an alleged latent appearance of left-sided pain.

Employer/Carrier argue Claimant's condition was aggravated, exacerbated, or worsened after employment with Employer because Dr. McCloskey opined "something happened" after August 27, 1999, based on additional work history with P&T. Their argument is without merit.

Dr. McCloskey specifically relied on the history he received from Claimant to form his opinion that Claimant sustained an injury with Employer. He noted Claimant never provided him with any history of any injury with P&T.

Dr. McCloskey was asked to assume Claimant's job description with P&T included lifting 100-pound boxes of Kaylo when he opined Claimant had a pre-existing back problem that "went over the edge" during the period Claimant worked for P&T. As noted above, Claimant's job description with P&T is not persuasive because of factual inconsistencies in his testimony and adverse testimony adduced from Joined Party/Carrier's witness. Thus, Dr. McCloskey offered an opinion based on an assumption of facts which are not established in the record. Accordingly, I find Dr. McCloskey's opinion based on the additional history is not persuasive in establishing Claimant suffered an aggravation, exacerbation, or worsening of his condition while working at P&T.

Assuming **arguendo** that Claimant articulated an injury with P&T that warrants invoking the Section 20(a) presumption, which I find is not supported in the record, Dr. Bazzone clearly and unequivocally opined Claimant's condition is the natural result of the injury he sustained with Employer, thus severing the causal connection between his alleged injury with P&T and his resultant condition. Without the aid of the Section 20(a) presumption, a preponderance of the record evidence compels a conclusion that Claimant's condition was not aggravated,

exacerbated, or worsened by working with P&T for the reasons discussed above.

In light of the foregoing, I find the preponderance of record evidence establishes Claimant's ongoing condition was caused by his May 5, 1999 job injury with Employer.

C. Responsible Employer

In cases under the Act involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or is an aggravation of a prior injury. Siminiski v. Ceres Marine Terminals, 35 BRBS 136 (2001); McKnight v. Carolina Shipping Co., 32 BRBS 165 (1998); Lopez v. Southern Stevedores, 23 BRBS 295 (1990); and Abbott v. Dillingham Marine & Manufacturing Co., 14 BRBS 453 (1981).

If a disability results from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for whom the claimant was working when he was first injured. However, if the second injury aggravates a prior injury, thus further disabling the claimant, the second injury is the compensable injury and liability therefore must be assumed by the employer or carrier for whom the claimant was working when "re-injured". Strachan Shipping Company v. Nash, 782 F.2d 513, 18 BRBS 45(CRT)(5th Cir. 1986); Willamette Iron and Steel Company v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

The Section 20(a) presumption, which is an aid for claimants seeking to establish their claims come within the provisions of the Act, plays no role in the determination of the responsible employer. Buchanan vs. International Transportation Services, 33 BRBS 32, 35-36 (1999); See, e.g., Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) (en banc).

Once the existence of work-related injuries with more than one covered employer is established, the inquiry is whether the claimant's disability is due to the natural progression of the first injury or is due instead to the aggravating or accelerating effects of the second injury. "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." A determination of this issue resolves which employer is liable for the totality of claimant's disability. Buchanon, supra (citing Kelaita, 799 F.2d at 1311; Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966)).

Each employer's burden is properly considered to be that of persuasion, rather than of production. Each employer bears the burden of persuading the fact-finder, by a preponderance of the evidence, that a claimant's disability is due to the injury with the other employer. Buchanon, supra (citing Kelaita, 799 F.2d at 1312); Mulligan v. Haughton Elevator, 12 BRBS 99 (1980); Crawford v. Equitable Shipyards, Inc., 11 BRBS 646 (1979), aff'd mem. sub nom. Employers National Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

As noted above, the record fails to establish Claimant suffered any injury while working for P&T. Consequently, the existence of work-related injuries with more than one covered employer has not been established. The inquiry of whether Claimant's disability is due to the natural progression of his May 5, 1999 injury or is due to the aggravating or accelerating effects of a second injury with P&T is rendered moot. Therefore, Employer/Carrier are liable for the entirety of Claimant's condition due to his May 5, 1999 job injury.

D. Intervening Causes

Employer/Carrier and Joined Party/Carriers argue Claimant's October 2000 hip injury and his March 2001 automobile accident constitute intervening causes which terminate their liability for his work-related condition. Claimant argues the accidents merely temporarily exacerbated his work-related symptoms.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A

South, 14 BRBS 39, 42 (1981); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps. Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Merrill, 25 BRBS at 144-145; Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The Fifth Circuit has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n, which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the court in Mississippi Coast Marine v. Bosarge held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Id.

In the present matter, Claimant's hip injury and automobile accident were the results of falling and third party negligence, respectively, which caused the accidents. There is no allegation nor any evidence that Claimant's work-related injury caused the accidents. Accordingly, I find Claimant's hip injury and automobile accident after his work-related injury were not the natural or unavoidable results of Claimant's work-related injury. Thus, the injuries may constitute intervening causes of a subsequent injury occurring outside of work to relieve Employer's liability for the subsequent injuries.

There is substantial evidence of record indicating Claimant's condition became worse as a result of his subsequent

injuries. Prior to his hip injury, Claimant requested a return to work slip in July 2000, when he desired to return to work. By September 2000, he was "a lot better" according to Dr. McCloskey, whose records indicate improvement in pain with no numbness or tingling in Claimant's legs. Dr. McCloskey concluded Claimant reached maximum medical improvement and assigned an impairment rating and physical restrictions. Although Claimant testified he might have used a cane or crutches in October 2000, Dr. McCloskey persuasively testified no such modality of treatment was required. There is no prescription for a cane of record. Accordingly, the record does not support a conclusion Claimant required a cane before his hip injury.

Shortly after reaching maximum medical improvement, Claimant sustained his hip injury. He used a cane to ambulate and complained of increased pain with numbness down his leg. His condition continued to deteriorate with increasing complaints of debilitating pain to Drs. Barnes and McCloskey. Dr. Barnes diagnosed a chip fracture and sciatica on Claimant's left side. Dr. McCloskey, who opined surgery would be necessary, performed back surgery in December 2000. Claimant's complaints with Dr. Barnes failed to improve until arthroscopic surgery was eventually performed in May 2001.

Likewise, there is substantial evidence of record establishing Claimant's car accident worsened his condition. Claimant clearly reported increased symptoms he related to the car accident to Drs. McCloskey, Barnes and Laseter. Dr. Barnes ultimately diagnosed rheumatoid arthritis in Claimant's left hip secondary to the automobile accident. Claimant's complaints of increasing symptoms after his car accident to Dr. Laseter are consistent with his MRI evidence which reveals Claimant's condition at L5 degenerated from May 2001, when post-surgical changes were seen, through January 2002, when a large left-sided defect at L5-S1 was reported prior to surgery, revealing a recurrent herniated disc.

However, the record does not establish to what extent the possible intervening causes overpowered or nullified Claimant's original condition after he reached maximum medical improvement from the job injury and initial surgery. An apportionment of Claimant's disability may not be determined based on Dr. McCloskey's testimony, which is vague. Dr. McCloskey assigned Claimant a five-percent impairment from his job injury, but also opined the job injury should be apportioned fifty percent of Claimant's fifteen percent total impairment. Accordingly, I find Dr. McCloskey's testimony unpersuasive in establishing apportionment of Claimant's disability.

Likewise, the vocational evidence is unhelpful for a resolution of the matter. As discussed below, Claimant established a **prima facie** case of total disability after his job injury. Evidence of suitable alternate employment was not provided until after the alleged intervening causes. The vocational evidence does not apportion any diminution of wage-earning capacity among the various accidents. Although Dr. McCloskey testified he would have released Claimant to medium-duty work in September 1999 before the hip injury and car accident, there is no evidence of suitable alternate employment at the medium level within Claimant's physical restrictions and limitations in September 1999. Thus, it is unclear to what extent Claimant's disability status could have been worsened by his hip injury and car accident.

In light of the foregoing, I find no reasonable basis on which to apportion disability among Claimant's injuries. Thus, Employer/Carrier are liable for the entire disability. See Plappert, supra.

E. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore

Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

F. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated, and I find, Claimant reached maximum medical improvement from his first surgery after his job injury on September 19, 2000, when Dr. McCloskey opined he reached maximum medical improvement and assigned restrictions. Accordingly, all periods of disability prior to September 19, 2000 are considered temporary under the Act.

Claimant's uncontroverted testimony is persuasive in establishing he was required to perform heavy lifting for Employer. He testified he was lifting a 100-pound fan when he became injured. Likewise, he testified he was required to lift five-gallon buckets of paint for Employer. His testimony that he could not return to his usual pre-injury work after his job injury is buttressed by Employer's performance evaluations, which indicate he received a merit increase for his capability and willingness to perform pre-injury jobs, but was terminated for an inability to work satisfactorily shortly after his injury.

Likewise, the opinions of Drs. McCloskey and Fineburg, who agree Claimant was occupationally disabled after his job injury, buttress Claimant's testimony that he was unable to return to his pre-injury job after his job injury.

Drs. Passyn and McDowell restricted Claimant from heavy lifting in May and June 1999. Their restrictions were never removed. Rather, Dr. McCloskey, despite Claimant's request for a release to return to work in July 2000, reminded Claimant he should not engage in heavy lifting. Thereafter, Claimant was restricted by Dr. McCloskey from heavy, strenuous, or overhead work in September 2001. He continued on restrictions until his January 2003 FCE which indicated Claimant was restricted to light duty.

In light of the foregoing, I find Claimant established a **prima facie** case of total disability after his May 5, 1999 job injury.

May 5, 1999 to August 30, 1999

Although Claimant continued working for Employer, who provided no light duty work for Claimant, I find his uncontroverted testimony that his post-injury condition was so painful that he "couldn't hardly walk" unless he was using

prescription medication persuasive in establishing that his post-injury work with Employer was accomplished through extraordinary effort and in spite of excruciating pain and diminished strength. Accordingly, I find the record supports a finding of total disability after May 5, 1999 until Claimant's employment with P&T. See e.g., Haughton Elevator Co. v. Lewis, 572 F.2d 447, 451, 7 BRBS 838, 850 (4th Cir. 1978) aff'g 5 BRBS 62 (1976); Richardson v. Safeway Stores, 14 BRBS 855, 857-58 (1982).

August 31, 1999 through March 3, 2000

Claimant worked for P&T from August 31, 1999 through March 3, 2000. Claimant performed light duty work within his physical restrictions and limitations according to his testimony and his reports to his various physicians. The record supports a finding that his work for P&T was not sheltered employment nor provided by a beneficient employer. See e.g., Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980).

Accordingly, Claimant's condition would be considered temporary partial from August 31, 1999 through March 3, 2000. However, P&T's wage and payroll records indicate Claimant earned $16,300.69 during 26 weeks of employment, which yields an average post-injury weekly wage-earning capacity of $626.95 ($16,200.69 ÷ 26 = $626.95). Accordingly, because Claimant's pre-injury average weekly wage was $492.17, as determined below, Claimant suffered no loss in wage-earning capacity during his period of employment with P&T. Therefore, Claimant is not entitled to compensation benefits from August 31, 1999 through March 3, 2000, because he suffered no economic impairment. See Sproull, supra at 110.

March 4, 2000 through September 18, 2000

On March 4, 2000, after he was terminated from P&T, Claimant's condition became temporary total until he reached maximum medical improvement on September 19, 2000. Consequently, from March 4, 2000 through September 18, 2000, Claimant's disability status is considered temporary total.

September 19, 2000 through Present and Continuing

Claimant's disability status became permanent on September 19, 2000, when he reached maximum medical improvement. Because Employer/Carrier failed to establish suitable alternate employment, as discussed below, Claimant's disability status from

September 19, 2000 through present and continuing is permanent total.

G. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be

absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

The record does not support a finding that Employer/Carrier established suitable alternative employment which is reasonably available to Claimant within his physical restrictions and limitations. Mr. Pennington's opinions that Claimant possessed the capacity and demeanor to perform various jobs are undermined by his admission that he failed to follow-up with Claimant since Claimant began taking different medications after undergoing another surgery. Moreover, although Mr. Pennington reported Pinkerton Security requires applicants to pass a drug screen, there is no evidence indicating Mr. Pennington discussed policies on drug use in the workplace with any of the other prospective

employers identified in his labor market survey. Thus, there is insufficient evidence establishing Claimant, who takes Lortab five of six times per day and Oxycontin twice daily, may have secured the identified positions.

Nevertheless, none of the jobs identified in Mr. Pennington's labor market survey establish suitable alternative employment within Claimant's physical restrictions and limitations. The majority of the jobs identified in Mr. Pennington's labor market survey exceed 35 miles from Claimant's residence. Although 35 miles may not necessarily be an excessive distance to travel, there is no substantial evidence establishing Claimant, who is taking a powerful narcotic which ordinarily warrants restrictions according to Dr. McCloskey, may commute such distances on a daily basis. Although Mr. Pennington observed that Claimant drove more than thirty miles for his vocational interview, he testified Claimant was not taking Oxycontin at that interview. Meanwhile, Claimant specifically testified he drives short distances only while taking Oxycontin. Accordingly, I find the jobs in Mobile, Alabama and Lucedale, Mississippi do not constitute suitable alternative employment.

Likewise, I find the driving positions identified in Mr. Pennington's labor market survey do not establish suitable alternative employment in the absence of substantial evidence indicating Claimant may reasonably perform the jobs under the influence of the medications he regularly takes. Thus, I find the sweeper driver position with Van Elmore Services and the driving position at Sickle Cell Disease Association fail to establish suitable alternative employment within Claimant's physical restrictions and limitations.

Assuming **arguendo** that Claimant could drive under the influence of his medications, the driving positions described in Mr. Pennington's survey fail to indicate whether Claimant could reasonably compete for the positions. The sweeper driver position with Van Elmore Services does not indicate lifting requirements necessary to fill water tanks from hydrants. Although the job indicates Claimant must reach and handle while pulling levers to activate brushes and sprayers, there is no indication how often Claimant is required to perform those tasks, which he may only occasionally perform according to his FCE. The driving position for Sickle Cell Disease Association requires an excellent driving record and an acceptable criminal background; however, there is insufficient evidence establishing Claimant's excellent driving record and acceptable criminal history. Although Mr. Pennington discussed Claimant's felony convictions at their interview, he failed to report Claimant's criminal

history. Consequently, I find the driving position with Sickle Cell Disease Association does not constitute suitable alternative employment within Claimant's physical restrictions and limitations.

Based on my observations of the demeanor of the witness, I find jobs as a security guard, an order clerk, and a dispatcher are not suitable for Claimant for reasons discussed below. Consequently, the Magnolia Security job, the Sears Telecenter job and the dispatcher jobs at City of Pascagoula and City of Biloxi are not suitable alternate employment.

Additionally, those jobs fail to establish the precise nature and terms of employment. Mr. Pennington did not report testing results establishing Claimant's ability to type, use computers, perform mathematical calculations or handle money. Thus, the record fails to establish whether Claimant could reasonably compete for the jobs with Sears, Murphy USA, Central Parking System or the City of Biloxi, which require Claimant to demonstrate a capability to perform those tasks. The Pascagoula Dispatcher job requires certification within 90 days outlined "within training requirements," which are not provided in the record. Without a description of training requirements or results of physical testing indicating Claimant may perform the required tasks, it is unclear whether Claimant may obtain the required certification for the Pascagoula dispatcher position, which I find does not establish suitable alternative employment.

Moreover, the Magnolia Security job indicates Claimant must frequently reach and handle; however, his FCE, to which Dr. McCloskey deferred and on which Mr. Pennington relied, indicates Claimant may only occasionally perform those tasks. The Pascagoula dispatcher job requires reaching and handling, but fails to indicate how often those tasks are necessary. The cashier position at Murphy USA fails to identify lifting or stocking requirements necessary for the job. The clerk/cashier job with Harbor Freight Tools indicates Claimant must perform light stocking and requires lifting up 20 pounds, but fails to indicate how often Claimant would be required to complete those tasks or at what height. The Central Parking System job indicates Claimant must pass a background check; however, there is insufficient evidence establishing Claimant's ability to pass such a test, as noted above.

Insofar as Mr. Pennington indicated jobs were "currently or periodically" available to Claimant within his physical restrictions and limitations in 1999, I find his report fails to meet Employer/Carrier's obligation to prove the availability of

actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. Mr. Pennington noted some jobs were available in 1999 when Claimant sustained his job injury, but failed to identify the date of the injury. There is no evidence establishing specifically when such job openings occurred or were filled by candidates. Thus, Mr. Pennington's vague testimony that jobs were available to Claimant in 1999 fails to identify jobs reasonably available to Claimant within the local community. Consequently, Employer/Carrier failed to prove the availability of actual, not theoretical, employment opportunities for Claimant in 1999.

It should be noted the jobs which Mr. Pennington identified were allegedly available in 1999 are jobs which I find are not suitable for Claimant, including jobs as a dispatcher and security officer, as noted above. The driving jobs with Grand Casino and President Casino do not provide lifting or reaching requirements, while the President Casino driving job requires applicants to possess a CDL. Thus, I find neither position establishes suitable alternative employment within Claimant's physical restrictions and limitations. The PFG assembler job indicates workers must perform at the sedentary to heavy exertional level, which exceeds Claimant's light-duty restriction. The position fails to describe lifting and reaching requirements necessary for the assembler job, which requires operating machinery to craft precision parts. There is no evidence indicating what skills are necessary to operate the machines. Although the inspection job indicates Claimant must sit at workbenches to examine products, there is no description of what lifting and reaching Claimant must perform, nor is there any evidence of the frequency of such tasks.

In light of the foregoing, I find Employer/Carrier failed to establish the availability of suitable alternative employment necessary to rebut Claimant's **prima facie** case of total disability. Consequently, Claimant's disability status after February 11, 2003, remains total.

H. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry

Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is

seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

In the present matter, Employer/Carrier contend Claimant's average weekly wage may be calculated by dividing $19,371.13, his earnings in the pre-injury weeks he worked for Employer divided by 39, the number of weeks he worked, yielding an average weekly wage of $496.70. Joint Party/Carrier assert Claimant's average weekly wage is $626.94.

The record indicates Claimant earned $20,179.15 in 41 weeks that he worked prior to his May 5, 1999 job injury. (EX-7). It is unclear whether Claimant was a five-day or six-day employee during the weeks he worked. Accordingly, since I conclude that Sections 10(a) and 10(b) cannot be reasonably and fairly applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter. Thus, Claimant's average weekly wage under Section 10(c) of the Act is $492.17 ($20,179.15 ÷ 41 = $492.17), which I find is a fair and reasonable estimation.

I. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but

only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Double recovery under the Act is not allowed. Luker v. Ingalls Shipbuilding, 3 BRBS 321 (1976). An insurance carrier providing coverage for non-occupational injuries may intervene to recover amounts erroneously paid for a work-related injury. Aetna Life Inc. CO. v. Harris, 578 F.2d 52 (3d Cir. 1978); Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 240 (CRT) (9th Cir. 1993). An employer need reimburse a claimant only for his own out-of-pocket expenses for necessary medical care, not for care mistakenly paid for by private, non-occupational insurers, which may intervene to recover such payments. Nooner v. Nat'l Steel & Shipbuilding Co., 19 BRBS 43 (1986).

Claimant seeks recovery for the surgeries performed by Dr. McCloskey, while Employer/Carrier contend Claimant's second and

third surgeries are unrelated to his job injury. Joined Party/Carriers contend their authorization was never requested.

Claimant's uncontroverted testimony that he requested treatment with Employer establishes he requested authorization for medical treatment. There is no evidence that Employer/Carrier authorized any of his medical treatment. Rather, there is evidence that Employer/Carrier denied liability for medical benefits, which they continue to contest. Accordingly, I find Claimant obtained his treatment under conditions of Employer/Carrier's neglect or refusal. Thus, to the extent any charges related to the natural and unavoidable result of Claimant's job injury have not been paid by Claimant's private carrier, which has not intervened in this matter, Employer/Carrier shall be liable for those charges.

The record supports a finding that Claimant's medical care through September 19, 2000, when he reached maximum medical improvement from his first surgery, was the natural and unavoidable result of his May 5, 1999 job injury, pursuant to the opinions of his treating physicians, Drs. Fineburg and McCloskey. There is no indication by any physician of record that Claimant's treatment through September 19, 2000 was unreasonable or unnecessary. Accordingly, I find Claimant's medical treatment, including surgery, through September 19, 2000 was reasonable and necessary treatment related to his May 5, 1999 job injury with Employer.

However, Dr. McCloskey's opinions that Claimant's subsequent surgeries were related to his hip injury and car accident are sufficient to sever the causal relationship between Claimant's job injury and his medical treatment. Insofar as it appears Dr. Bazzone opined Claimant's medical treatment after his job injury, arguably including his surgical treatments, were related to his job injury, I find his opinions less persuasive than those of Dr. McCloskey. Dr. McCloskey specifically addressed Claimant's history of intervening causes while Dr. Bazzone generally answered a question of whether or not Claimant's post-injury treatment was related. Moreover, Dr. McCloskey, who performed three surgeries and treated Claimant for his ongoing condition, is unquestionably more familiar with Claimant's condition and in a better position to render a causative opinion. His opinions are supported by substantial record evidence, as noted above.

In light of the foregoing, I find the second and third surgeries are not the natural and unavoidable results of his job injury. Accordingly, Employer/Carrier shall not be liable for Claimant's surgical treatment after September 19, 2000.

A resolution of the responsible employer issue in favor of P&T renders the issue of liability for Claimant's medical benefits moot as to P&T. Assuming **arguendo** P&T might be liable for benefits, I find Claimant, by his own uncontroverted testimony, admitted he never requested Joined Party/Carrier's authorization for his medical treatment. The record does not support a conclusion Claimant's treatment was provided in a situation of emergency, neglect or refusal. Consequently, I find Joined Party/Carriers are not liable for the medical treatment Claimant received.

V. SECTION 8(f) RELIEF

An employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) such pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability; and (3) the pre-existing disability was manifest to the employer. 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219 , 222 (1988).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1989); Pino v. International Terminal Operating Company, Inc., 26 BRBS 81 (1992); Thompson v. Northwest Enviro Services, Inc., 26 BRBS 54 (1992). Employment-related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such cases. Director, OWCP v. General Dynamics Corp., 705 F.2d 562 (1st Cir. 1983); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 517 (9th Cir. 1980); Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440 (3d Cir. 1979); Director, OWCP v. Potomac Electric Power Co., 607 F.2d 1378 (D.C. Cir. 1979).

The "pre-existing permanent partial disability" provision is not defined in the Act, but has been construed by the courts as a serious, lasting physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability. C & P Telephone

Co. v. Director, OWCP, supra; Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145 (9th Cir. 1991); Devine v. Atlantic Container Lines, G.E.I., 25 BRBS 5 (1990). The existence of a "serious, lasting disabling condition" must be objectively shown to be of medical "significance." Director, OWCP v. Berkstresser, 921 F.2d 306, 310 (D.C. Cir. 1990). A medical condition need not be economically disabling in order to constitute a pre- existing permanent partial disability within the meaning of §§ 8(f). Atlantic & Gulf Stevedores, Inc. v. Director, OWCP, 542 F.2d 602 (3d Cir. 1976).

It is also required that the claimant's pre-existing condition contribute to the cumulative amount of claimant's permanent total or partial disability. Thus, the employer must establish that the work-related injury, in conjunction with the prior condition, "materially and substantially" aggravates and/or contributes to the claimant's permanent and worsened condition. Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989).

The "manifest" requirement is the creation of jurisprudence. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991). This prerequisite is satisfied generally if the pre-existing condition is actually known by the employer or sufficiently documented in the claimant's medical records. Todd v. Todd Shipyards Corp., 16 BRBS 163 , 167 (1984); Currie v. Cooper Stevedoring Company, 23 BRBS 420 (1990). The medical records must contain a diagnosis of the condition to be manifest but need not indicate the severity or precise nature of the condition. Topping v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 40 (1983); Lockheed Shipbuilding v. Director, OWCP, supra, at 1145.

In the present matter, Employer/Carrier have not shown that Claimant suffered from a pre-existing permanent partial disability which was manifest to Employer. Although X-rays on March 17, 2000 and January 18, 2002 indicate Claimant may have had a bullet in his spine at L2, there is no evidence indicating Claimant had a serious, lasting physical condition which predisposed him to a higher risk of further injury such that a cautious employer would have been motivated to discharge him because of the greatly increased risk of compensation liability. There is otherwise no evidence of medical significance discussed by any physicians of record or in Claimant’s medical records which could support a conclusion of a pre-existing condition. Thus, Employer/Carrier have not established the requisite elements for Section 8(f) entitlement and their request for such relief is **DENIED**.

It should be noted that Joined Party/Carriers cannot establish entitlement to relief under Section 8(f) because the record does

not support a finding that Claimant was injured while working for P&T. Thus, P&T has no liability in this matter. Assuming **arguendo** that P&T was found liable for Claimant's injury, which is not supported in the record, Joined Party/Carriers have established the requisite elements entitling them to Section (8)f relief based on the persuasive post-hearing testimony adduced from Dr. McCloskey.

Dr. McCloskey opined Claimant had a pre-existing problem with his back, namely a bulging disc at L5 that began while formerly working with Employer. Dr. McCloskey opined Claimant suffered a disabling chronic back pain condition prior to employment with P&T. He agreed that Claimant's post-injury condition was not due solely to the alleged job injury with P&T because Claimant's pre-existing condition combined with the alleged injury at P&T. He agreed that Claimant's disability following an alleged injury with P&T was materially and substantially greater than that which would have resulted from the alleged second injury alone. Claimant's back condition was identified in the medical records and physical therapy records. Accordingly, based on the record, and specifically the deposition testimony of Dr. McCloskey describing Claimant's pre-existing condition, I find and conclude that P&T has established the three pre-requisites necessary for Section 8(f) entitlement. Therefore, Joint Party's request for special fund relief under the provisions of Section 8(f) would be granted if Claimant actually sustained an injury as alleged.

VI. CREDIT FOR PAYMENTS MADE

Section 14(j) of the Act provides:

> (j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j).

The purpose of Section 14(j) is to reimburse an employer for the amount of its advance payments, where these payments were too generous, for however long it takes, out of unpaid compensation found to be due. Stevedoring Servs. of America v. Eggert, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir.), cert. denied, 505 U.S. 1230 (1992); Tibbetts v. Bath Iron Works Corp., 10 BRBS 245, 249 (1979); Nichols v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 710, 712 (1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). Section 14(j) does not, however, establish a right of repayment or recoupment for an alleged overpayment of

compensation. Ceres Gulf v. Cooper, 957 F.2d 1199, 1208, 25 BRBS 125, 132 (CRT) (5th Cir. 1992); Eggert, 953 F.2d at 557, 25 BRBS at 97 (CRT); Vitola v. Navy Resale & Servs. Support Office, 26 BRBS 88, 97 (1992).

Section 14(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. Balzer v. General Dynamics Corp., 22 BRBS 447, 451 (1989), on recon., aff'd, 23 BRBS 241 (1990); Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 415 (1989); Mijangos v. Avondale Shipyards, 19 BRBS at 21. The employer's credit is based on the total dollar amount paid, not the number of weeks paid. Hubert v. Bath Iron Works Corp., 11 BRBS 143, 147 (1979), overruled in part by Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 14 BRBS 363 (1980).

Employer/Carrier and Joined Party/Carriers assert they may be entitled to a credit for "any salary paid" in lieu of disability and medical benefits. Likewise, they seek a credit for medical benefits paid by third-party private carriers. They offer no authoritative support for their arguments, which I find to be without merit.

Where the employer continues the claimant's regular salary during the claimant's period of disability, the employer will not receive a credit unless it can show the payments were *intended as advance payments of compensation*. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 723, 21 BRBS 51, 59 (CRT) (11th Cir. 1988); Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388, 396 (1978); McIntosh v. Parkhill-Goodloe Co., 4 BRBS 3, 11 (1976), aff'd mem., 550 F.2d 1283 (5th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); Luker v. Ingalls Shipbuilding, Inc., 3 BRBS 321, 326 (1976). There is no indication either Employer/Carrier or P&T intended to pay any compensation or benefits in this matter. Rather, they have continued to deny liability for compensation and benefits. Moreover, the employers allege they were not notified of any injury until after Claimant was terminated. Arguably, neither employer **could** show Claimant's salary was intended as advance payments of compensation in the absence of knowledge of a potentially compensable, work-related injury.

Accordingly, there is insufficient evidence in the record indicating any payments were intended as advance payments of compensation. Thus, Employer/Carrier and Joined Party/Carriers may not receive a credit for any regular salary paid during Claimant's period of disability.

An employer is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered "compensation" for the purposes of Section 14(j) of the Act. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130, 1137 (1981). Because medical expenses are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. Aurelio v. Louisiana Stevedores, 22 BRBS 418, 423 (1989), aff'd mem., No. 90-4135 (5th Cir. 1991). Accordingly, Employer/Carrier and Joined Party/Carriers may not receive a credit for payments made under Claimant's non-occupational insurance plan, as those payments are not considered "compensation."

Additionally, in Plappert, 31 BRBS at 111, the Board found that an employer was liable to a claimant for all medical expenses paid by the claimant related to his job injury, and for all medical expenses related to the injury paid by the claimant's private health insurer, provided the private health insurer filed a claim for reimbursement of same. Claimant's private health insurer did not file an intervention in this case. Consequently, Claimant is only entitled to reimbursement for out-of-pocket medical expenses related to his job injury.

VII. NOTICE UNDER SECTION 12(a) OF THE ACT

In the joint exhibit, Employer/Carrier and Joint Party/Carrier assert Claimant failed to timely notify them of his work-related condition because he failed to give written notice within thirty days of injury under Section 12(a) of the Act. 33 U.S.C. § 912(a). According to Section 20(b) of the Act, it shall be presumed that sufficient notice of a claim has been given in the absence of substantial evidence to the contrary. 33. U.S.C. § 20(b).

Under Section 12(d) of the Act, an employee's failure to provide written notice pursuant to Section 12(a) is excused when the employer has knowledge of the injury. 33 U.S.C. §§ 12(d)(1). If an employer's supervisor knows of a claimant's fall at work but was told that the claimant was not injured, the employer does not have knowledge of the claimant's injury so as to excuse the claimant's late notice of injury. Kulick v. Continental Baking Corp., 19 BRBS 115 (1986). Moreover, although knowledge on the part of employer is presumed if substantial evidence to rebut Section 20(b) is not produced, employer's burden further includes the requirement that it show that it was prejudiced by the failure of claimant to give formal notice. See Strachan Shipping Co. v. Davis, 8 BRBS 161, 571 F.2d 968 (5th Cir. 1978); Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989)(an employer did not know of the possibility that a claimant's injury was work-related until the claim was filed over two years later).

Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. See Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). A generalized claim of not being able to investigate while the claim is fresh is insufficient to prove prejudice. See Ito Corporation v. Director, OWCP, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

A. Employer

Claimant's credible testimony that he provided his supervisor with a release to return to work shortly after his job injury is uncontroverted in the record; however, the release to return to work indicates no restrictions were assigned. Thus, there is substantial evidence indicating the supervisor was notified of the back injury, but understood Claimant was not injured. Moreover, Claimant admitted he failed to report to Employer's medic before treating with the emergency room. Accordingly, I find Employer/Carrier did not have knowledge so as to excuse Claimant's late notice of injury.

However, Employer failed to allege or introduce evidence it was prejudiced by Claimant's failure to give formal notice. Employer stipulated it was informed of Claimant's injury on September 21, 1999, well before Claimant ever treated with Dr. McCloskey in December 1999 or received his first surgical intervention following his job injury. Thus, there is no substantial evidence of record establishing Employer was unable to effectively investigate some aspect of the claim due to Claimant's failure to provide adequate notice. Thus, Employer/Carrier's liability for Claimant's job injury is not relieved by Claimant's failure to provide written notice.

B. Joined Party

Having found P&T is not the responsible employee, their notice argument is rendered moot. However, assuming **arguendo** that Claimant established an injury with P&T, it should be noted that Claimant admitted failing to disclose to P&T or its officials or employees details of any injury. Accordingly, I find no reasonable grounds to conclude P&T had knowledge of any injury.

P&T argues, and I agree, that Claimant's failure to provide written notice prejudiced P&T, who was not made aware of an alleged injury until June 19, 2001, after Claimant underwent various medical treatments including surgeries. P&T was unable to determine which alleged trauma caused Claimant's condition and

unable to otherwise provide medical services. Accordingly, I find Joined Party/Carriers have established they were unable to effectively investigate some aspect of the claim due to Claimant's failure to provide adequate notice.

VIII. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier were notified of Claimant's injury on September 21, 1999. Thereafter, Employer/Carrier controverted the claim on October 15, 1999. Employer/Carrier failed to pay any compensation or benefits.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[28] Thus, Employer was liable for Claimant's permanent total disability compensation payment on October 5, 1999. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by October 19, 1999 to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on October 15, 1999 and is not liable for Section 14(e) penalties.

IX. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds,

[28] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

X. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on September 19, 2000, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year for the applicable period of permanent total disability, and shall commence October 1, 2000.[29] This increase shall be the lesser of the percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

XI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application

[29] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (1996)(It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

for attorney's fees.[30] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

XII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Joined Party/Carriers shall not be liable for disability compensation benefits or medical benefits arising from Claimant's May 5, 1999, work injury or any other alleged work injury.

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from May 5, 1999 to August 30, 1999 and from March 4, 2000 through September 18, 2000, based on Claimant's average weekly wage of $492.17, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall not be liable for disability compensation benefits from August 31, 1999 through March 3, 2000, when Claimant suffered no economic impairment.

4. Employer/Carrier shall pay Claimant compensation for permanent total disability from September 19, 2000 to present and continuing based on Claimant's average weekly wage of $492.17, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

---

[30] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 7, 2000**, the date this matter was referred from the District Director.

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 5, 1999, work injury, pursuant to the provisions of Section 7 of the Act consistent with the instant Decision and Order.

7. Employer/Carrier shall not be liable for an assessment under Section 14(e) of the Act.

8. Employer/Carrier's application for Section 8(f) entitlement is **DENIED**.

9. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

10. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3rd day of July, 2003, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge